



THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Via Electronic Mail

November 4, 2021

Director Linda Ackerman
Metropolitan Water District of Southern California
700 N Alameda Street
Los Angeles, CA 90012

Subject: Referral to Fair Political Practices Commission

Dear Director Ackerman,

On November 9, 2021, Metropolitan's Board of Directors will consider Item 7-13 to rescind and reconsider prior board actions approving Local Resources Program contracts between Metropolitan Water District of Southern California (Metropolitan), Municipal Water District of Orange County (MWD OC), Santa Margarita Water District, and El Toro Water District. This board action is based on a determination that it was "likely" that you had "remote interests" that were not publicly disclosed, as required by Government Code section 1090, when the board previously approved the contracts.

As required by Metropolitan Water District Administrative Code section 7140(a), the matter must be referred to the Fair Political Practices Commission.

Administrative Code section 7140(a), states in relevant part:

When the Ethics Officer concludes, with the advice of General Counsel, that a preponderance of evidence exists that indicates that a member of the Board is in non-compliance with state law, the matter will be referred to the Fair Political Practices Commission, Attorney General, or District Attorney, as applicable, with notice of the referral provided to the Audit and Ethics Committee, director and the appointing member agency at the time of the referral.

Notice of the referral is also being provided to Metropolitan's Audit and Ethics Committee Chair and to the MWD OC Board President.

Sincerely,

A handwritten signature in black ink that reads "Abel Salinas". The signature is written in a cursive, flowing style.

Abel Salinas
Ethics Officer

cc: Marsha Ramos, Chair, Metropolitan Audit and Ethics Committee
Satoru Tamaribuchi, Board President, MWD OC
Marcia Scully, General Counsel, Metropolitan



● **Board of Directors**
Water Planning & Stewardship

11/9/2021 Board Meeting

7-13

Subject

(1) Rescind the Board's June 8, 2021 action authorizing the General Manager to enter into a Local Resources Program (LRP) agreement with the Municipal Water District of Orange County (MWDOC) and Santa Margarita Water District (SMWD) for the Las Flores Recycled Water Expansion Project (Las Flores Project); review and consider SMWD's approved Final Mitigated Negative Declaration and Addendum for the Las Flores Project and take related CEQA actions; and, after the disclosure of a remote financial interest under Government Code Section 1090 (Section 1090) and director recusal, consider and authorize an LRP agreement with MWDOC and SMWD for the Las Flores Project.

(2) Rescind the Board's December 13, 2016 actions authorizing the General Manager to enter into LRP agreements with MWDOC and SMWD for the Lake Mission Viejo Advanced Purification Water Treatment Facilities (Lake Mission Viejo Facilities) and with MWDOC and the El Toro Water District (ETWD) for the El Toro Recycled Water System Expansion Phase II Project (El Toro Project); after the disclosure of a remote financial interest under section 1090 and director recusal, consider and authorize LRP agreements with MWDOC and SMWD for the Lake Mission Viejo Facilities and with MWDOC and ETWD for the El Toro Project; and authorize retroactive LRP payments in the amounts of \$522,000 and \$110,000 for the Lake Mission Viejo Facilities and El Toro Project, respectively, as credit against returned payments in the same amount; The General Manager has determined these proposed actions are exempt or otherwise not subject to CEQA

Executive Summary

In September 2021, Director Ackerman reported to Metropolitan's General Counsel that she inadvertently failed to disclose a potentially conflicting financial interest and voted on an LRP agreement with MWDOC and SMWD for the Las Flores Project, which the Board authorized on June 8, 2021. After consultation with Metropolitan's Ethics Office and outside counsel, and a review of all other LRP agreements with MWDOC authorized by the Board since 2009, it was determined that Director Ackerman had a potentially conflicting financial interest and voted on two prior LRP agreements authorized by the Board on December 13, 2016: (1) with MWDOC and SMWD for the Lake Mission Viejo Facilities; and (2) with MWDOC and the ETWD for the El Toro Project.

After consultation with the Ethics Office and outside counsel, it was determined that it is likely that Director Ackerman had a financial interest in the agreements both in June 2021 and December 2016 under Government Code Section 1090, although that interest fell within the "remote interest" exception under Section 1090. In order to comply with Section 1090, Director Ackerman needs to disclose the remote financial interest, such disclosure needs to be noted in Metropolitan's records, and Director Ackerman cannot participate in the discussion or vote on these items.

In order to correct any potential violation of Section 1090, it is recommended that the Metropolitan Board rescind its prior authorizations and consider the three LRP agreements anew, after the disclosure of the remote financial interest and Director Ackerman's recusal from the vote on the items. Because Metropolitan has commenced payments on the two LRP agreements approved in 2016, it is also recommended that the contracting parties return the funds and the Board authorize retroactive payments as a credit against the returned payments in an equal amount.

Details

Recommended Rescissions and Authorizations

Government Code Section 1090 prohibits a member of a legislative body from entering into or participating in making a contract in which they have a financial interest. Section 1090 may impact the entire Board – not just the member with the financial interest. If there is a Section 1090 financial interest in a contract and no exception applies, Section 1090 prohibits the contract from being made with the governmental entity even if the conflicted member recuses himself or herself.

Exceptions to Section 1090 include certain situations, which are deemed to be either a remote interest or a noninterest. If the financial interest is a remote interest, the legislative body can enter into the contract if the interest is publicly disclosed, becomes a part of the record, and the conflicted board member does not participate in the discussion, vote, or otherwise attempt to influence, or participate in, the matter. If the financial interest is a noninterest, the legislative body may enter into a contract and the board member may participate in the discussion and vote. In some circumstances, the “noninterest” must also be publicly disclosed and become part of the record.

In September 2021, Director Ackerman reported to the General Counsel that she may have inadvertently failed to disclose a remote financial interest and recuse herself from voting on the Board action taken on June 8, 2021, which authorized the General Manager to enter into an LRP agreement with MWDOC and SMWD for the Las Flores Project. Director Ackerman’s spouse has consulting contracts with both MWDOC and SMWD.

The consulting contract with MWDOC was originally entered into in 2009, between MWDOC and the Nossaman law firm where Senator Ackerman was employed. He did not have an ownership interest in the law firm. Although, as Senator Ackerman’s spouse, Director Ackerman has a financial interest in his income, his income from the law firm was classified as a “noninterest” and Director Ackerman was not precluded from participating in contracts involving MWDOC. In January 2013, the contract between MWDOC and Senator Ackerman changed to be an agreement between MWDOC and Ackerman Consulting.

The consulting contract between Ackerman Consulting and SMWD was entered into in February 2013, has been renewed annually and is still in effect. None of the work pursuant to the consulting contracts with either MWDOC or SMWD pertained to LRP agreements and the approval of the LRP agreements had no effect on the income received by Senator Ackerman’s consulting firm.

After Director Ackerman notified the General Counsel of a possible conflict, the General Counsel had discussions with Metropolitan’s outside counsel, Senator Ackerman’s personal counsel, and MWDOC counsel. The General Counsel also discussed the issue with the Ethics Office. Although there were positions advanced that the current arrangement between Senator Ackerman and MWDOC could continue to be a noninterest as it was when the contract was with the Nossaman law firm, Metropolitan’s General Counsel, the Ethics Office, and Metropolitan’s outside counsel concluded that, based upon a review of Attorney General opinions, California Fair Political Practices Commission (FPPC) regulations, and multiple FPPC advice letters, the current arrangements between Senator Ackerman and MWDOC, and between Senator Ackerman and SMWD, create a “remote interest” requiring both Director Ackerman’s disclosure and recusal from the vote on contracts with those entities. Although all of the agreements would have been approved without Director Ackerman’s vote, because the procedure for approval of the June 2021 and December 2016 agreements was arguably not compliant with Section 1090, the contracts could be considered legally void.

Further research was done to determine whether, with regard to the 2016 agreements, a statute of limitations would apply protecting the agreements from challenge or cancellation. Due to the nature of the agreements, the General Counsel and outside counsel agree that the statute of limitations does not protect the agreements and the best course of action is for the Metropolitan Board to rescind the original board authorization of all three agreements and consider them anew in a manner compliant with Section 1090.

Because payments have commenced on the two agreements approved in 2016, it is also recommended that the contracting parties return the funds and the Board authorize retroactive payments as a credit against the returned payments in an equal amount. Specifically, it is recommended that the Board authorize retroactive LRP payments in the amount of \$522,000 as a credit against returned payments in the same amount for the Lake Mission Viejo

Facilities, and in the amount of \$110,000 as a credit against returned payments in the same amount for the El Toro Project.

The three agreements recommended for authorization have been modified to adjust the duration and maximum amount payable to be consistent with the terms of the agreements originally approved by the Board. If approved, Metropolitan's total financial exposure under this action remains the same as was previously considered and approved by the Board's prior approval of the three contracts that are recommended to be rescinded and considered anew for approval. Staff recommends approval of the proposed action.

Local Resources Program Agreements

1. Background

Metropolitan created the LRP to provide financial incentives to local projects such as water recycling, groundwater recovery, and seawater desalination projects developed by local and member agencies. Since the inception of the LRP in 1982, Metropolitan has provided financial assistance for the production of almost 4.1 million acre-feet (AF) of recycled water and recovered groundwater. These programs provide benefits to all member agencies regardless of individual project location. Benefits include helping increase water supply reliability, reducing imported water demands, decreasing the burden on Metropolitan's infrastructure, reducing system costs, and freeing up conveyance capacity. In addition, these programs help Metropolitan meet its legislative mandates under SB 60 to expand water conservation, recycling, and groundwater storage and replenishment measures. In October 2018, the Board approved an interim LRP target of 170,000 acre-feet per year (AFY) to develop additional contractual yield. Currently, the remaining portion of the LRP target is 104,478 AFY. In fiscal year 2019/20, Metropolitan incentivized member agencies to produce approximately 128,401 AF of local supply.

2. Proposed LRP Agreements to be Reauthorized

a. LRP Agreement for Las Flores Project

To increase local supply development, staff recommends that the Board again authorize the General Manager to enter into an LRP agreement with MWDOC and SMWD to provide financial incentives for the proposed Las Flores Project. The Las Flores Project will be located within the unincorporated community of Las Flores in south Orange County. The Project will convert up to 209 AFY of potable water demands to recycled water for irrigation purposes in Las Flores. The Las Flores Project includes construction of over 12,000 feet of new recycled water distribution pipelines and repurposing a surplus sewer lift station to serve as a recycled water booster pump station. Source water for the Las Flores Project is tertiary-treated wastewater from either SMWD's Oso Creek Water Reclamation Plant or Chiquita Water Reclamation Plant. SMWD will own and operate the Las Flores Project and plans to deliver water in 2022.

The Las Flores Project, described in **Attachment 1**, complies with the LRP criteria adopted by the Board on October 13, 2014.

Key terms of the proposed Las Flores Project LRP agreement, subject to approval in form by the General Counsel, include the following:

- Agreement term is 25 years for a maximum contract yield of 209 AFY.
- Pay for performance – LRP financial incentives are only for recycled water delivered by the Project for beneficial use.
- Sliding scale incentives up to \$475 per AF, calculated annually based on actual project unit costs that exceed Metropolitan's prevailing water rate over 15 years.
- Termination for nonperformance if construction does not commence within two years of agreement execution or if recycled water deliveries are not realized within four years of agreement execution.
- Reduction in Metropolitan's contract commitment if the Project falls short of production targets measured in four-year intervals throughout the agreement term.

b. LRP Agreement for the Lake Mission Viejo Facilities

Likewise, to increase local supply development, staff recommends that the Board again authorize the General Manager to enter into an LRP agreement with MWDOC and SMWD to provide financial incentives for the completed Lake Mission Viejo Facilities.

The Lake Mission Viejo Facilities are a 300 AFY Advanced Water Treatment Facility that use a combination of microfiltration/ultrafiltration and reverse osmosis to further treat the tertiary-treated recycled water produced by either the existing SMWD's Oso Creek Water Reclamation Plant, Chiquita Water Reclamation Plant, or Moulton Niguel Water District 3A Water Reclamation Plant. Project water will be used by SMWD to provide water for Lake Mission Viejo. SMWD owns and operates the Lake Mission Viejo Facilities, which began deliveries in the spring of 2017.

The Lake Mission Viejo Facilities, described in **Attachment 2**, comply with the LRP criteria adopted by the Board. Key terms of the proposed reauthorized agreement, subject to approval in form by the General Counsel, include the following:

- Pay for performance – LRP financial incentives would only be paid for recycled water delivered by the Project for beneficial use.
- Sliding Scale incentives up to \$475 perAF, calculated annually, based on actual project unit cost exceeding Metropolitan's prevailing water rate over 15 years.
- Termination for nonperformance if construction does not commence within two years of agreement execution or recycled water deliveries are not realized within four years of agreement execution [since 2016, the facilities have been completed and recycled water deliveries commenced in 2017].
- Reduction in Metropolitan's contract commitment if the Project falls short of production targets measured in four-year intervals throughout the agreement term.

As part of the reauthorization of the LRP agreement for the Lake Mission Viejo Facilities, retroactive LRP payments in the amounts of \$522,000 will need to be made as a credit against returned payments in the same amount.

c. LRP Agreement for the El Toro Project

Likewise, to increase local supply development, staff recommends that the Board again authorize the General Manager to enter into an LRP agreement with MWDOC and ETWD to provide financial incentives for the completed El Toro Project. The El Toro Project provides up to 350 AFY of recycled water for landscape irrigation within El Toro's service area. El Toro owns and operates the project and began deliveries in 2018.

The El Toro Project, described in **Attachment 3**, complies with the LRP criteria adopted by the Board. Key terms of the proposed reauthorized agreement, subject to approval in form by the General Counsel, include the following:

- Pay for performance - LRP financial incentives would only be paid for recycled water delivered by the Project for beneficial use.
- Sliding Scale incentives up to \$475 per AF, calculated annually, based on actual project unit cost exceeding Metropolitan's prevailing water rate over 15 years.
- Termination for nonperformance if construction does not commence within two years of agreement execution or recycled water deliveries are not realized within four years of agreement execution [since 2016, the facility has been completed and recycled water deliveries commenced in 2018].
- Reduction in Metropolitan's contract commitment if the project falls short of production targets measured in four-year intervals throughout the agreement term.

As part of the reauthorization of the LRP agreement for the El Toro Project, retroactive LRP payments in the amounts of \$110,000 will need to be made as credits against returned payments in the same amount.

Policy

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

By Minute Item 49923, dated October 14, 2014, the Board approved refinements to the Local Resources Program to encourage additional local resource production.

By Minute Item 51356, dated October 9, 2018, the Board approved an interim Local Resources Program target yield of 170,000 AFY of new water production.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

Las Flores Project

Pursuant to the provisions of CEQA and the State CEQA Guidelines, SMWD, acting as Lead Agency, prepared and processed a Final Mitigated Negative Declaration (MND) for the proposed project in unincorporated Orange County. The Final MND was adopted and the project approved by the Lead Agency on June 19, 2020. The Lead Agency also approved the project Mitigation Monitoring and Reporting Program (MMRP). Subsequently, SMWD prepared an Addendum to the project to identify minor project modifications (dated March 19, 2021). Metropolitan, as a Responsible Agency under CEQA, is required to certify that it has reviewed and considered the information in the Final MND and Addendum and adopt the Lead Agency's findings and MMRP prior to approval of the formal terms and conditions for the proposed agreement. The environmental documentation is included as **Attachment 4**.

Lake Mission Viejo Facilities and El Toro Project

The proposed actions involve funding for continued operation of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use and no possibility of significantly impacting the physical environment. Accordingly, the proposed actions qualify under Class 1 Categorical Exemption (Sections 15301 of the State CEQA Guidelines).

CEQA determination for Option #2:

None required

Board Options

Option #1

(1) Rescind the Board's June 8, 2021 action authorizing the General Manager to enter into a Local Resources Program (LRP) agreement with the Municipal Water District of Orange County (MWDOC) and Santa Margarita Water District (SMWD) for the Las Flores Recycled Water Expansion Project (Las Flores Project); review and consider SMWD's approved Final Mitigated Negative Declaration and Addendum for the Las Flores Project and take related CEQA actions; and, after the disclosure of a remote financial interest under Government Code Section 1090 (Section 1090) and director recusal, consider and authorize an LRP agreement with MWDOC and SMWD for the Las Flores Project;

(2) Rescind the Board's December 13, 2016 actions authorizing the General Manager to enter into LRP agreements with MWDOC and SMWD for the Lake Mission Viejo Advanced Purification Water Treatment Facilities (Lake Mission Viejo Facilities) and with MWDOC and the El Toro Water District (ETWD) for the El Toro Recycled Water System Expansion Phase II Project (El Toro Project); after the disclosure of a remote financial interest under Section 1090 and director recusal, consider and authorize LRP agreements with MWDOC and SMWD for the Lake Mission Viejo Facilities and with MWDOC and ETWD for the El Toro Project; and authorize retroactive LRP payments in the amounts of \$522,000 and \$110,000 for the Lake Mission Viejo Facilities and El Toro Project, respectively, as credit against returned payments in the same amount.

Fiscal Impact: Metropolitan's maximum financial obligation for all three LRP agreements would not increase beyond their initial obligation of \$6,120,375 based on a project yield of 21,475 AF. Because the prior incentive payments of \$632,000 will be returned and then repaid as a credit, the maximum obligation

going forward is reduced to \$5,488,375. These incentive payments are factored into Metropolitan's rate projections and will be included in future budgets.

Business Analysis: Approval of the projects helps Metropolitan to achieve its LRP goals and meet its legislative mandates, while reducing the district's system costs.

Option #2

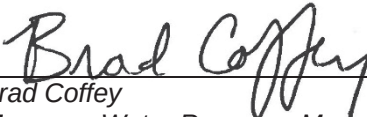
Do not rescind the actions authorizing the listed LRP agreements and do not authorize the issuance of new LRP agreements and payment credits.

Fiscal Impact: Unknown

Business Analysis: Public agency reliance and expectations related to the payment of incentives in support of LRP goals and the specific projects would be unmet.

Staff Recommendation

Option #1


 Brad Coffey
 Manager, Water Resource Management

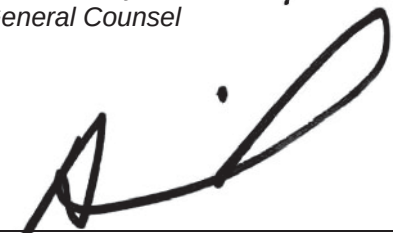
11/1/2021

Date


 Marcia Scully
 General Counsel

11/1/2021

Date


 Adel Hagekhalil
 General Manager

11/2/2021

Date

Attachment 1 – Las Flores Recycled Water Expansion Project – Project Description

Attachment 2 – Lake Mission Viejo Advanced Purification Water Treatment Facilities – Project Description

Attachment 3 – El Toro Recycled Water System Expansion Phase II Project – Project Description

Attachment 4 – Initial Study/Mitigated Negative Declaration Las Flores Enhanced Water Reliability Project – Project Description

Ref# wrm12686672