



San Diego County Water Authority

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August 16, 2015

Randy Record and
Members of the Board of Directors
Metropolitan Water District of Southern California
P.O. Box 54153
Los Angeles, CA 90054-0153

MEMBER AGENCIES

- Carlsbad Municipal Water District
 - City of Del Mar
 - City of Escondido
 - City of National City
 - City of Oceanside
 - City of Poway
 - City of San Diego
 - Fallbrook Public Utility District
 - Helix Water District
 - Lakeside Water District
 - Olivenhain Municipal Water District
 - Otay Water District
 - Padre Dam Municipal Water District
 - Camp Pendleton Marine Corps Base
 - Rainbow Municipal Water District
 - Ramona Municipal Water District
 - Rincon del Diablo Municipal Water District
 - San Dieguito Water District
 - Santa Fe Irrigation District
 - South Bay Irrigation District
 - Vallecitos Water District
 - Valley Center Municipal Water District
 - Vista Irrigation District
 - Yuima Municipal Water District
- OTHER REPRESENTATIVE**
- County of San Diego

RE: Board Memo 8-3 - Authorize Amendment to the California Agreement for the Creation and Delivery of Extraordinary Conservation Intentionally Created Surplus - **OPPOSE**

Dear Chairman Record and Board Members,

For the reasons described in the attached letter dated August 15, 2015 to Marcia Scully, we **OPPOSE** staff's recommendation to authorize amendment to the above agreement.

We would very much like to support MWD's efforts to obtain additional water supplies to meet the current severe water supply challenges it faces. However, for the reasons stated in the letter from our special counsel we cannot do so until the issues noted in the letter are addressed.

Sincerely,

Michael T. Hogan
Director

Keith Lewinger
Director

Fern Steiner
Director

Yen C. Tu
Director

Attachment:
Brad Herrema Letter to Marcia Scully dated August 16, 2015

cc: Jeff Kightlinger, MWD General Manager
San Diego County Water Authority Board of Directors

August 16, 2015

Bradley J. Herrema
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BHerrema@bhfs.comMarcia Scully, General Counsel
Metropolitan Water District of Southern California
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RE: Water Planning and Stewardship Committee Board Memo 8-3 (Authorize Amendment to the California Agreement for the Creation and Delivery of Extraordinary Conservation Intentionally Created Surplus)

Dear Ms. Scully:

Regarding the above Committee Meeting and Board Meeting scheduled for next Monday and Tuesday, respectively, Board Memo 8-3 requests authorization to amend the 2007 California Agreement for the Creation and Delivery of Extraordinary Conservation Intentionally Created Surplus ("ICS Agreement"), to increase the maximum amount of conserved water that the IID may store in Metropolitan Water District of Southern California's (MWD) facilities for a three-year term (Amendment). The Amendment would expand the mechanisms through which IID might generate water to be stored as ICS within MWD's facilities to include not only fallowing, but also on-farm and system conservation improvements. The Board Memo also states that, "utilization of this additional storage by IID would provide [MWD] access to additional water during the ongoing California Drought."

Under section 3.2 of the IID/SDCWA Agreement for Transfer of Conserved Water (IID/SDCWA Transfer Agreement), during Agreement Years 1 through 18, the Water Authority holds a right of first refusal (ROFR) to any transfer by IID of Additional Available Water. (See my May 12, 2015 letter to Ross Simmons, Esq., for further discussion of the ROFR.) Thus, SDCWA's ROFR attaches to the water proposed to be conserved by IID and made available for MWD's use under the proposed Amendment.

The Water Authority's consent to the earlier action taken by the IID Board of Directors on April 29, 2015 in regard to additional conservation during 2014-15 did not, and does not constitute a waiver by the Water Authority of its rights under the IID/SDCWA Transfer Agreement or its ability to exercise its ROFR as to this subsequently conserved water. Rather, the Water Authority's past correspondence on this issue should be understood by IID and by MWD as a continuing objection to IID's transfer of Additional Available Water without the consent of the Water Authority.

Subject to your acknowledgement of the Water Authority's ROFR, and in the interest of helping MWD meet the current severe water supply challenges it faces, the Water Authority is willing to consider giving its consent to the transfer of this Additional Available Water and proposed Amendment. However, SDCWA is concerned that MWD has not sufficiently considered the potential environmental impacts of the proposed action and that approval of the Amendment likely requires compliance with the California Environmental Quality Act (CEQA) by analyzing the impacts of this Agreement on the Salton Sea. Although Board Memo 8-3 states that, "***IID would be responsible for and would defend and indemnify Metropolitan from any claim or liability associated with the Salton Sea from this action,***" that is not a sufficient basis for the

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Marcia Scully
August 16, 2015
Page 2

MWD Board to approve the Amendment based on the CEQA determination for Option #1 as described in Board Memo 8-3.

The Board Memo's proposed CEQA determination, should the Board approve the Amendment, is that the Amendment is exempt from CEQA and identifies three Guidelines sections that cover the Amendment. The Board Memo states that the Amendment is not defined as a project under CEQA because it involves continuing administrative activities (Section 15378(b)(2) of the State CEQA Guidelines). The Board Memo additionally states that the proposed action qualifies for a Class 1 categorical exemption from the provisions of CEQA because the Amendment is associated with operating existing public water conveyance facilities with negligible or no expansion of use and no possibility of significantly impacting the physical environment, and the general rule that CEQA applies only to projects with the potential for causing significant effects (Section 15301 and 15061 (b)(3) of the State CEQA Guidelines).

SDCWA is concerned that Guidelines sections 15378(b)(2) and 15301 do not appear to apply to MWD's proposed action, as the potential environmental impacts of concern do not arise solely from the use of existing facilities but the potential impacts on the environment of creating the conserved water to be stored in these facilities, particularly upon the Salton Sea. Guidelines section 15061(b)(3) would not appear to apply either because it can be relied on only if "it can be seen **with certainty** that there is **no possibility** that the activity in question may have a significant impact on the environment...." (emphasis added). Such a determination must be supported with evidence, which the Board Memo does not identify. Without this evidence, a Court could not make the required evidentiary findings confirming the application of the claimed exemptions.

Moreover, the Board Memo's finding as to a certainty of no possibility of significant environmental impacts is puzzling and would appear to be unsupported, given that the QSA project EIRs found that the conservation mechanism of fallowing was found to have fewer impacts on the Salton Sea than on farm and system conservation improvements. That is why the State Board Order approving the QSA transfers required the use of fallowing in the first 15 years of the QSA project. In light of this, it does not seem likely that the Board Memo conclusion that it is certain that there is no possibility that the Amendment may have a significant impact on the environment can be supported with substantial evidence.

Further, the Board Memo does not discuss, as required, that the exemption is not barred by one of the exceptions in section 15300.2. As MWD must consider "evidence in its files of potentially significant effects" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1103), given its extensive knowledge of the prior environmental analyses supporting IID's transfer supporting conservation activities, it does not seem that MWD could make such a finding.

The Water Authority cannot and will not consent to the transfer and proposed Amendment unless IID and MWD address the impacts to the Salton Sea resulting from decreased inflows to the Salton Sea and plans for mitigation of those impacts. (See Interim Guidelines for Operation of Lake Mead and Lake Powell, § 3.B [creation of ICS is "subject to such environmental compliance as may be required."]).

Given the concerns that IID has expressed in multiple forums – including its petition to the State Water Resources Control Board, before the Little Hoover Commission and at the QSA-JPA – regarding air quality impacts related to the decline of the Salton Sea, it is imperative that IID and MWD identify the mitigation proposed for the transfer and Amendment that will certainly further exacerbate the projected recession of the Sea's shoreline. As noted above, Board Memo 8-3 indicates that, as part of the proposed Amendment, "IID would be responsible for and indemnify [MWD] from any claim or liability associated with the Salton Sea from this action." Given the possibility of impacts to the Salton Sea discussed above, it must also be demonstrated that the proposed transfer and Amendment will not affect the financial or direct mitigation obligations of the QSA-JPA.

Marcia Scully
August 16, 2015
Page 3

We look forward to working cooperatively with all parties to improve water supply reliability during the drought, provided that these important issues are addressed. A copy of my letter of today's date to counsel for IID is enclosed. Hopefully, some progress will be made at our upcoming meeting to that these issues may be addressed to all parties' mutual satisfaction.

Please contact me if you have any questions.

Sincerely,



Bradley J. Herrema

cc: Maureen A. Stapleton
Dan Denham
Terry Fulp
Paul Matuska
Chuck Bonham
Curt Tauscher
Kevin Kelley
Tina Shields
Charles DuMars
Jeffrey Kightlinger
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RE: Water Planning and Stewardship Committee Board Memo 8-3 (Authorize Amendment to the California Agreement for the Creation and Delivery of Extraordinary Conservation Intentionally Created Surplus

Dear Ms. Hoff:

Enclosed is a copy of my letter to Marcia Scully of today's date, regarding the above item.

As the Water Authority has stated in its letters of May 21 and July 10, 2015, it looks forward to the opportunity to have further discussions with IID regarding opportunities to promote flexibility and facilitate implementation of the Transfer Agreement. To this end, we look forward to meeting with you on September 2, 2015. Given the timing of MWD's board meeting and request for board approval of Board Memo 8-3, the Water Authority had no alternative but to object to the board action for the reasons stated. We hope that all issues may ultimately be addressed to all parties' mutual satisfaction.

Sincerely,



Bradley J. Herrema

cc: Kevin Kelley
Tina Shields
Charles DuMars
Maureen A. Stapleton
Dan Denham
Terry Fulp
Paul Matuska
Chuck Bonham
Curt Tauscher
Jeffrey Kightlinger
Marcia Scully
Bill Hasencamp
Jim Barrett
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