



San Diego County Water Authority

4677 Overland Avenue • San Diego, California 92123-1233
(858) 522-6600 FAX (858) 522-6568 www.sdcwa.org

December 9, 2013

Marcia Scully, General Counsel
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: Applicability of MWD's Administrative Code

Dear Marcia,

We are quite concerned with the answers given by Assistant General Counsel Bennion at recent meetings to the effect that the requirements of the MWD Administrative Code are "deemed" waived at any time the the MWD Board takes an action that is contrary to or inconsistent with the Code. Please see a copy of the relevant portions of the minutes and transcript of the recent meetings at which these opinions were expressed (attached). Not only does this position effectively render the Administrative Code meaningless, but it is inconsistent with the very process by which the Code is formally adopted and amended. Further, since the potential for a "deemed" waiver, which is itself a separate action, is not listed in the agenda statement for ítems on the MWD agenda there would be a violation of the Brown Act.

The suggestion that waivers of adopted Administrative Code provisions are "inherent in the powers of the Board under the MWD Act to govern all of the affairs of the District" does not explain why ad hoc waivers of the Administrative Code are permissible. Rather, since the Board itself has adopted the Administrative Code, ad hoc waivers are by definition, inconsistent with the established principle that rules formally adopted must be followed unless formally changed.

This issue is a matter of the utmost importance to the Water Authority and the public we serve. Please provide written clarification whether the opinion expressed by Assistant General Counsel Bennion is the official position of your office, and, if so, please provide a detailed explanation of the legal basis of that position. Thank you.

Sincerely,

Michael T. Hogan
Director

Keith Lewinger
Director

Vincent Mudd
Director

Fern Steiner
Director

Attachments

1. Transcript excerpt from October 8, 2013 MWD Board meeting
2. Transcript excerpt from November 19, 2013 MWD Legal and Claims Committee meeting

Cc: MWD Board of Directors
San Diego County Water Authority Board of Directors

A public agency providing a safe and reliable water supply to the San Diego region

Transcription

Sydney Bennion (Assistant General Counsel, MWD)

10-1. Approve compensation recommendation for General Manager, General Counsel, General Auditor, and Ethics Officer

Board Meeting

October 8, 2013

Bennion (1:12:32): To respond to Director Lewinger's question on the Administrative Code and action by the board today; if the board decides to take an action today would effectively waive any contradictory provisions of the Administrative Code.

Transcription

Keith Lewinger (Director, San Diego County Water Authority)
Vincent Mudd (Director, San Diego County Water Authority)
Sydney Bennion (Assistant General Counsel, MWD)

7-5. Approve amendments to the Metropolitan Water District Administrative Code to conform to current laws, practices and regulations

Legal and Claims Committee Meeting

November 19, 2013

Lewinger (1:42): Thank you Mr. Chairman. Not a question about this item specifically, but a general question about the Admin Code. Last month we had an issue where we were not following the Admin Code and we heard from legal counsel that if the board took an action that it would be deemed to have changed the Admin Code. And I would like to know whether there are any provisions in the Admin Code to waive provisions in the Admin Code and whether the board has to take an affirmation action to do so.

Bennion: I believe what we said was that if the board takes a specific action that is contrary to an Admin Code provision it is deemed a waiver of that provision. It is not an amendment of the provision it is a waiver to apply in that particular fact situation.

Lewinger: So the board does not have to take a specific action to waive the Admin Code? They just do whatever they feel like and if it doesn't comport to the Admin Code; it's deemed waived for that action?

Bennion: Essentially that's correct. The concept is that the board has adopted the Admin Code and if the board determines that a specific action should be taken and it's not consistent then that does not invalidate the action by the board that is inconsistent with the code.

Flemming: Any other questions.

Wunderlich?: Steiner. Fern.

Flemming: Yes, Director Steiner.

Steiner: Nevermind.

Flemming: Yes, Director Mudd.

Mudd: I do have a question if that's accurate. I find it a little strange. But is it possible to show us where that concept is written in the current Admin Code? Because if it's not written in the Admin Code that there's a process for waiving the Admin Code, I'm not sure I understand under what power are we operating where we can just simply make any change. Technically what you are saying is that the board can take an action that completely changes everything in the Admin Code and just their action alone is considered a waiver. And I would just like to know where is that written in the Admin Code?

Bennion: It's inherent in the powers of the board under the MWD Act to govern all of the affairs of the District. That includes adoption of the Admin Code and the respected provisions and it also includes other actions that are taken by the board.