

Marina Coast Water District
Agenda Transmittal

Agenda Item: 9-A

Meeting Date: August 9, 2011

Submitted By: Lloyd Lowrey

Presented By: Lloyd Lowrey

Reviewed By: Jim Heitzman

Agenda Title: Reconsider Adoption of Resolution No. 2011-55 to Review a Request by the General Manager under Government Code Sections 995-996.6 and 825-825.6 and Authorize the District to Engage Legal Counsel for the General Manager

Detailed Description: The Board is requested to reconsider the adoption of Resolution No. 2011-55 to review a request by the General Manager under Government Code Sections 995-996.6 and 825-825.6 and authorize the District to engage legal counsel for the General Manager.

On July 12, 2011, the Board of Directors approved Resolution No. 2011-55 with a vote of 4-Ayes and 1-Abstention (Burns).

As a member of the Board who voted on the prevailing side, Director Shriner asked that this item be reconsidered on August 9, 2011. Section 33 (Reconsideration) of the District's Board Procedures Manual states that "At the meeting succeeding that on which a final vote on any question has been taken, said vote may be reconsidered on the motion of a member of the Board who voted on the prevailing side. A motion to reconsider shall be in order only if that item had been timely placed on that agenda. It shall not be in order for any member to move a reconsideration at the meeting at which such final vote was taken. Said motion of reconsideration shall have precedence over every other motion."

The Board of Directors will be required to vote on whether to reconsider this item. The information below was provided at the July 12, 2011 Board meeting.

Marina Coast Water District (MCWD) has for many years supported and participated in regional efforts to augment the water supply for the region that includes the area served by MCWD. Recent efforts have focused on the Regional Desalination Project ("RDP") approved by the California Public Utilities Commission through its proceeding number A.04-09-019, in which MCWD has participated as a party. The Board approved a contract in 2007 to employ Jim Heitzman as MCWD's General Manager, and Mr. Heitzman has been continuously employed in that capacity to date, devoting considerable time at the Board's direction to MCWD's participation in regional water planning efforts, particularly the RDP. On April 5, 2010, the Board adopted Resolution No. 2010-20, approving MCWD's participation in the RDP in accordance with a Settlement Agreement and Water Purchase Agreement, subject to approval by the CPUC. After the CPUC approved the project in December 2010, the Board on February 22, 2011 approved a Project Management Agreement with RMC Water and Environment ("RMC").

On June 21, 2011, Monterey County released a document entitled "Summary of Preliminary Findings Regarding Director Stephen Collins' Business Relationship With RMC Water and Environment and Marina Coast Water District." The Summary, prepared by Remcho, Johansen

& Purcell, LLP, (the "Remcho Report"), stated that certain conduct raises questions about the validity of contracts to which Marina Coast Water District is a party and named MCWD's General Manager, Jim Heitzman, in connection with the conduct questioned. On July 1, 2011, the MCWD Board voted to release a document entitled "Preliminary Report on Conflicts of Interest in the Processing and Approval of the Regional Desalination Project Contracts and the Impact of any Conflict on the Validity of the Contracts" prepared by James L. Markman and others of the law firm of Richards, Watson & Gershon (the "Markman Report"), which found no facts to indicate that either Mr. Heitzman or any other official of MCWD violated Government Code section 1090 or any other provision of law prohibiting conflicts of interest.

On July 6, 2011, the General Manager submitted a written request to MCWD's Board of Directors, requesting defense and indemnification of any claims against him as General Manager or individually for his actions within the scope of his employment for MCWD in connection with the RDP, including the matters discussed in the Remcho Report. The request was made in accordance with Government Code Sections 995-996.6 and 825-825.6.

No legal or administrative claims, actions, or proceedings have been instituted against either MCWD or the General Manager. However, as demonstrated by the Remcho Report, there are ongoing investigations into this matter which involve requests or demands to interview or obtain information or testimony from the General Manager.

The Government Code requires a public entity, upon request of an employee or former employee to provide for the defense of a civil action unless the entity finds that the act or omission giving rise to the claim was not within the scope of employment, that the employee acted because of actual fraud, corruption, or actual malice, or that the defense would create a specific conflict of interest between the entity and the employee. A public entity is not required to, but may provide for the defense of an administrative proceeding and for criminal actions and proceedings for an act or omission in the scope of employment, upon a determination that the defense would be in the best interests of the public entity and that the employee acted in good faith, without malice and in the apparent interests of the public entity.

Environmental Review Compliance: None required.

Prior Committee or Board Action: The Board approved MCWD's participation in the RDP and Jim Heitzman's employment as MCWD's General Manager as discussed above.

Board Goals/Objectives: *Strategic Plan, Mission – Providing high quality water, wastewater and recycled water services to the District's expanding communities through management, conservation and development of future resources at reasonable costs.*

Financial Impact: X Yes No

Funding Source/Recap: Administration account.

Material Included for Information/Consideration: Resolution No. 2011-55; and, Copy of Request dated July 6, 2011, from the General Manager.

Staff Recommendation: That the Board of Directors review a request by the General Manager under Government Code Sections 995-996.6 and 825-825.6 and authorize the District to engage Mr. Steve Churchwell, DLA Piper LLP. as legal counsel for the General Manager.

Action Required: ___X___ Resolution ___ Motion ___ Review
(Roll call vote is required.)

Board Action

Resolution No _____ Motion By _____ Seconded By _____

Ayes _____ Abstained _____

Noes _____ Absent _____

Reagendized _____ Date _____ No Action Taken _____

July 12, 2011

Resolution No. 2011-55
Resolution of the Board of Directors
Marina Coast Water District
Approving Engagement of Legal Counsel Steve Churchwell, DLA Piper LLP
for the General Manager

RESOLVED by the Board of Directors (“Directors”) of the Marina Coast Water District (“District”), at a regular meeting duly called and held on July 12, 2011, at the business office of the District, 11 Reservation Road, Marina, California as follows:

WHEREAS, the District employed Jim Heitzman in 2007 to serve as the District’s General Manager and Mr. Heitzman has been so employed continuously since then; and,

WHEREAS, the District has for many years supported and participated in regional efforts to augment the water supply for the region that includes the area served by MCWD, recent efforts having focused on the Regional Desalination Project (“RDP”) approved by the California Public Utilities Commission through its proceeding number A.04-09-019, in which MCWD has participated as a party; and,

WHEREAS, on April 5, 2010, the Directors adopted Resolution No. 2010-20, approving MCWD’s participation in the RDP in accordance with a Settlement Agreement and Water Purchase Agreement, subject to approval by the CPUC; and,

WHEREAS, after the CPUC approved the RDP in December 2010, the Directors on February 22, 2011 approved a Project Management Agreement with RMC Water and Environment (“RMC”); and,

WHEREAS, public statements have raised questions about the propriety of certain conduct in connection with the approval of agreements for the RDP by the Monterey County Board of Supervisors, which statements have mentioned the General Manager’s name in connection with the questioned conduct; and,

WHEREAS, such public statements have mentioned ongoing investigations by the Monterey County District Attorney and the State Fair Political Practices Commission; and,

WHEREAS, such statements have included statements made in a document prepared by Remcho, Johansen & Purcell, LLP, entitled “Summary of Preliminary Findings Regarding Director Stephen Collins’ Business Relationship With RMC Water and Environment and Marina Coast Water District” (the “Remcho Report”), released by Monterey County on June 21, 2011; and,

WHEREAS, the District, on July 1, 2011, received and the Directors reviewed a document entitled “Preliminary Report on Conflicts of Interest in the Processing and Approval of the Regional Desalination Project Contracts and the Impact of any Conflict on the Validity of the Contracts” prepared by James L. Markman and others of the law firm of Richards, Watson &

Gershon (the “Markman Report”), which found no facts to indicate that either Mr. Heitzman or any other official of Marina Coast violated Government Code section 1090 or any other provision of law prohibiting conflicts of interest; and,

WHEREAS, the General Manager, on July 5, 2011, submitted a written request to the Directors, requesting defense and indemnification of any claims against him as General Manager or individually for his actions within the scope of his employment for MCWD in connection with the RDP, including the matters discussed in the Remcho Report. The request was made in accordance with Government Code Sections 995-996.6 and 825-825.6; and,

WHEREAS, District Counsel advises that the Government Code requires a public entity, upon request of an employee or former employee to provide for the defense of a civil action unless the entity finds that the act or omission giving rise to the claim was not within the scope of employment, that the employee acted because of actual fraud, corruption, or actual malice, or that the defense would create a specific conflict of interest between the entity and the employee; and,

WHEREAS, District Counsel further advises that a public entity is not required to, but may provide for the defense of an administrative proceeding and for criminal actions and proceedings for an act or omission in the scope of employment, upon a determination that the defense would be in the best interests of the public entity and that the employee acted in good faith, without malice and in the apparent interests of the public entity; and,

WHEREAS, although no legal or administrative or proceedings have been instituted, public statements have referenced an ongoing investigation, which could include interviewing the General Manager or requesting or demanding information or testimony from him; and,

WHEREAS, based on the information known or available, the Directors find there is no evidence that the General Manager acted outside the scope of his employment and the authority and direction given to him by the Directors in supporting and advocating for the RDP and MCWD’s participation in the RDP and in working with legal counsel and other consultants to advise and assist the District in connection with the RDP and MCWD’s participation in the RDP; and,

WHEREAS, based on the information known or available, the Directors find there is no evidence that the General Manager did not act in good faith, without malice, upon advice of legal counsel for the District, and in the apparent interests of the District and persons served by the District; and,

WHEREAS, there is no evidence that providing for legal representation would create a specific conflict of interest between the District and the General Manager; and,

WHEREAS, the Board finds that it is in the best interests of the District and the persons served by the District to approve and authorize and provide for the legal representation of the General Manager in connection with investigations by the Monterey County District Attorney or the State Fair Political Practices Commission concerning the Regional Desalination Project, the matters discussed in the Remcho Report and any related matters; in accordance with Government Code Sections 995-996.6 and 825-825.6.

NOW, THEREFORE, BE IT RESOLVED, as follows:

1. The District shall provide for legal representation of Jim Heitzman through MCWD's designated legal counsel, Steve Churchwell, DLA Piper LLP., 400 Capitol Mall, Suite 2400, Sacramento, CA 95814, in connection with any requests or demands for information or testimony as part of any investigations by the Monterey County District Attorney or the State Fair Political Practices Commission relating to Mr. Heitzman in his official or individual capacity or both, on account of any act or omission occurring within the scope of Mr. Heitzman's employment as an employee of Marina Coast Water District in connection with the Regional Desalination Project described in MCWD Board Resolution No. 2010-20 and with matters discussed in the Remcho Report; and,

2. The District will pay the reasonable cost of Mr. Heitzman's counsel approved by the Directors to advise, represent and defend Mr. Heitzman, for so long as District Counsel advises and the directors find that there is no specific conflict of interest between the District and Mr. Heitzman. The Board President is authorized to sign the contract with Steve Churchwell, DLA Piper LLP.

PASSED AND ADOPTED on July 12, 2011, by the Board of Directors of the Marina Coast Water District by the following roll call vote:

Ayes: Directors Gustafson, Nishi, Shriner, Lee
Noes: Directors None
Absent: Directors None
Abstained: Directors Burns

William Y. Lee, President

ATTEST:

Jim Heitzman, Secretary

CERTIFICATE OF SECRETARY

The undersigned Secretary of the Board of the Marina Coast Water District hereby certifies that the foregoing is a full, true and correct copy of Resolution No. 2011-55 adopted July 12, 2011.

Jim Heitzman, Secretary

To: Board of Directors, Marina Coast Water District

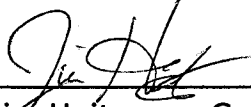
I request that you provide for my defense through MCWD's designated legal counsel, to the fullest extent required and permitted by Government Code Sections 995 through 996.6, inclusive, of any civil action or proceeding, any administrative proceeding and any criminal action or proceeding brought against me in my official or individual capacity or both, on account of any act or omission occurring within the scope of my employment as an employee of Marina Coast Water District in connection with the Regional Desalination Project described in MCWD Board Resolution No. 2010-20 and with matters discussed in a document released by the County of Monterey on June 21, 2011, entitled "Summary of Preliminary Findings Regarding Director Stephen Collins' Business Relationship With RMC Water and Environment and Marina Coast Water District." The Summary, prepared by Remcho, Johansen & Purcell, LLP, (the "Remcho Report"), states that certain conduct raises questions about the validity of contracts to which Marina Coast Water District is a party and names me in connection with the conduct questioned. I further request that you defend and indemnify me against any claim or action against me in connection with the above matters, to the fullest extent required and permitted by Government Code Sections 825 through 825.6, inclusive.

All of my actions in connection with the Regional Desalination Project have occurred within the scope of my employment as an employee of Marina Coast Water District as authorized and directed by the Board of Directors of MCWD. All of my actions have been undertaken and conducted in good faith in the furtherance of the apparent and best interests of MCWD and the constituents of MCWD. The "Preliminary Report on Conflicts of Interest in the Processing and Approval of the Regional Desalination Project Contracts and the Impact of any Conflict on the Validity of the Contracts" prepared by James L. Markman and others of the law firm of Richards, Watson & Gershon and released by MCWD on July 1, 2011 the ("Markman Report"), found no facts to indicate that either I or any other official of Marina Coast violated Government Code section 1090 or any other provision of law prohibiting conflicts of interest. You have previously received copies of the Remcho Report and the Preliminary Report.

Thank you for your prompt attention to this request.

Dated: July 6, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jim Heitzman", written over a horizontal line.

Jim Heitzman, General Manager
Marina Coast Water District