

## AGENDA ITEM SUBMITTAL

**Meeting Date:** January 7, 2015

**To:** Board of Directors

**From:** Mike Markus

**Staff Contact:** J. Kennedy

**Budgeted:** N/A

**Budgeted Amount:** N/A

**Cost Estimate:** N/A

**Funding Source:** N/A

**Program/ Line Item No.** N/A

**General Counsel Approval:** N/A

**Engineers/Feasibility Report:** N/A

**CEQA Compliance:** N/A

**Subject: PROPOSED POSEIDON RESOURCES CITY OF HUNTINGTON BEACH  
OCEAN DESALINATION PROJECT**

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### SUMMARY

Much work has been done over the past 18 months studying the potential range of costs and the different options surrounding the proposed Poseidon Resources Huntington Beach Ocean Desalination project. Staff believes that the best way to resolve these issues is to initiate negotiations to develop a non-binding term sheet with Poseidon Resources. Staff is also bringing back the issue of the Citizens Advisory Committee as directed by the Board.

#### Attachment(s):

- Presentation material
- AES Power Plant Summary
- Legal Counsel Memorandum

### RECOMMENDATION

1. Direct staff to begin negotiating a term sheet with Poseidon Resources to purchase the 56,000 acre-feet per year of water created by the Huntington Beach Ocean Desalination project, and
2. Report back to the Board no later than the March 18, 2015 Board meeting on the progress of the negotiations, and
3. Establish a Citizens Advisory Committee with each Director appointing up to two members to the Committee.

### BACKGROUND/ANALYSIS

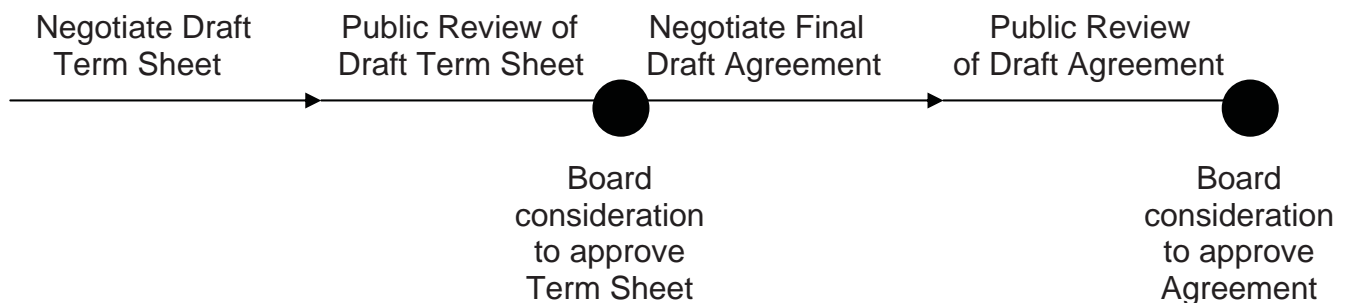
The District's primary mission is to ensure sufficient water supplies are always available for the residents and businesses with its service territory. The proposed Poseidon Resources project offers a unique opportunity to reduce the need for imported water and improve the overall water supply reliability of the area.

## Term Sheet

The negotiation of a term sheet would provide the overall business terms and structure of a partnership with Poseidon. Different options are available to the District that could be considered. The term sheet would provide more details and clarity on how the District and Poseidon Resources could work together to potentially construct the project. Until the District formally sits down with Poseidon and begins to have negotiations, what type of deal is ultimately available will not be known. A term sheet would define items such as:

- What is the estimated cost of the water,
- Who is responsible to construct, own and operate the plant,
- Who is responsible to construct, own and operating the distribution system,
- How will the project be financed

If a term sheet is negotiated, it would be provided to the local community, recommended Citizens Advisory Committee and Groundwater Producers for comments. If the Board were to ultimately approve entering into a term sheet with Poseidon Resources, it would be used as the basis for negotiating and considering a final agreement with Poseidon if the Board so chooses. The following figure generally shows the process of how preparing a term sheet could lead to negotiating a final agreement with Poseidon to implement the proposed project.



If the Board approves beginning term sheet negotiations, at a later date staff may request hiring a financial consultant and/or legal counsel with public private partnership project experience depending upon where the negotiations lead and the types of issues that arise.

## Citizens Advisory Committee

The District originally considered establishing an ocean desalination Citizens Advisory Committee (CAC) in July 2013. Applications for the committee were solicited and reviewed. However in January 2014 it was decided to defer consideration of such a committee. Given staff's recommendation to begin negotiating a term sheet, staff also recommends establishing the CAC committee as follows:

- Each Board member can appoint up to two individuals to sit on the CAC,
- Board members should inform the General Manager of their appointments by January 15, 2015,

- Staff would report the CAC members to the Board on January 21, 2015,
- Staff would administrate the CAC meetings,
- The general purpose of the CAC is to allow for a full discussion and debate of issues regarding the proposed project in a relatively informal setting that will provide information to assist the OCWD Board in evaluating the proposed project,
- Meetings will be tentatively scheduled for February 25, March 25 and April 22, 2015 at 5:30 in the evening. Additional meetings will be scheduled if/as needed.

### Legal Issues

Different legal questions have arisen regarding the District's ability to participate with Poseidon Resources to potentially construct the project. The questions relate to the District's overall statutory powers and rate setting authority. In summary, legal counsel has indicated that the District's involvement in the project should relate to the management of the groundwater basin. A memorandum provided by legal counsel addressing these issues is attached to this report.

### Status of AES Power Plant

As requested by the Board a separate memorandum describing the status and future plans of the AES plant has been prepared and is attached to this report.

### Distributing the Poseidon Water

The Board previously requested staff to study the option of the District taking all of the Poseidon water for recharge into the groundwater basin. Under the General Managers signing authority Brady and Associates was hired for \$20,000 to assist in determining the options available to the District. Howard Johnson from Brady and Associates is uniquely qualified for this work as he has detailed knowledge of the local distribution facilities that are needed to distribute the Poseidon water.

Currently the District does not have the necessary facilities to take the Poseidon water to recharge it into the groundwater basin. Brady and associates will be studying options such as:

- How many new injection wells would have to be constructed,
- Where new injection wells could be located,
- The optimum methods to distribute the water, and
- How could the Poseidon water be pumped into the GWRS pipeline for distribution

### California Coastal Commission Process

The Coastal Commission has assembled an Independent Scientific and Technical Advisory Panel. The panel is reviewing alternative intake options for the project as compared with Poseidon's proposed plan to modify the existing AES intake pipeline. The panel has concluded in their Phase I report that only the seabed infiltration gallery and the beach gallery (surf zone infiltration gallery) are "technically feasible" options for a 50 mgd plant at this location. All of the well options (vertical shallow, vertical deep, horizontal, Ranney, etc.) to provide source water to the proposed plant were found to have fatal flaws.

The technical panel is moving on to a Phase 2 analysis where size, scale, constructability, cost, energy use, site requirements, and environmental impacts will be considered for the two remaining intake options identified in the Phase 1 work. This Phase 2 work should be completed during the first half of 2015.

Additionally the Coastal Commission staff may want Poseidon to provide other information and analysis which is listed below before they consider this investigation and the ultimate application complete.

- Model smaller size plants such as a 20 mgd or 30 mgd facility to determine if some of the alternative intake options eliminated by the technical panel in their Phase I work become feasible with a smaller plant.
- Possibly consider other sites for a plant.
- What is the justification for a 50 mgd plant.

Poseidon, the technical panel and the Coastal Commission staff are actively discussing these issues to determine the need for the information and how it could be obtained. It is Poseidon's goal to complete the Coastal Commission process in 2015.

#### State Water Resources Control Board

The State Water Resources Control Board has provided proposed draft amendments to the Water Quality Control Plan for Ocean Waters of California (Ocean Plan) to address desalination facilities. A final draft of the amendments is expected to be released this spring with consideration to adopt the new regulations potentially occurring this summer. Poseidon has assumed that modifications to the existing AES intake and outfall costing up to approximately \$42 million with another \$1.5 million of annual operation and maintenance cost will be necessary to satisfy these new requirements. These modifications would be required once the AES power plant decommissions its water cooling system which is expected to occur around 2022.

#### **PRIOR RELEVANT BOARD ACTION(S)**

05/22/13 – Adopt resolution stating that ocean desalination supplies should be considered in the District's water supply portfolio.

07/24/13 - Authorize execution of a confidentiality agreement and receive information from Poseidon Resources to study the economic feasibility of a seawater desalination facility in Huntington Beach that may lead to a water purchase agreement for the entire productive capacity of the plant; and Establish a "Citizen's Advisory Committee" for the potential project;

11/11/13 – Support California Coastal Commission approval of the proposed Poseidon Project

01/08/14 M14-2 – Direct staff to arrange a Board meeting with the consultants used by SDCWA for their Carlsbad desalination project.

02/19/14 - Request proposals from the three firms that assisted the SDCWA with the City of Carlsbad desalination project

04/02/14 – Authorize staff to issue financial RFP's

05/21/14 – Defer action to select a financial consultant to June 4, 2014

06/04/14 – Hired Clean Energy Capital for \$49,720 to provide a financial analysis report.

12/03/14 – Increased the Clean Energy Capital contract by \$27,000 to respond to comments on the financial analysis report.



# Poseidon Resources Huntington Beach Seawater Desalination Project

January 7, 2015



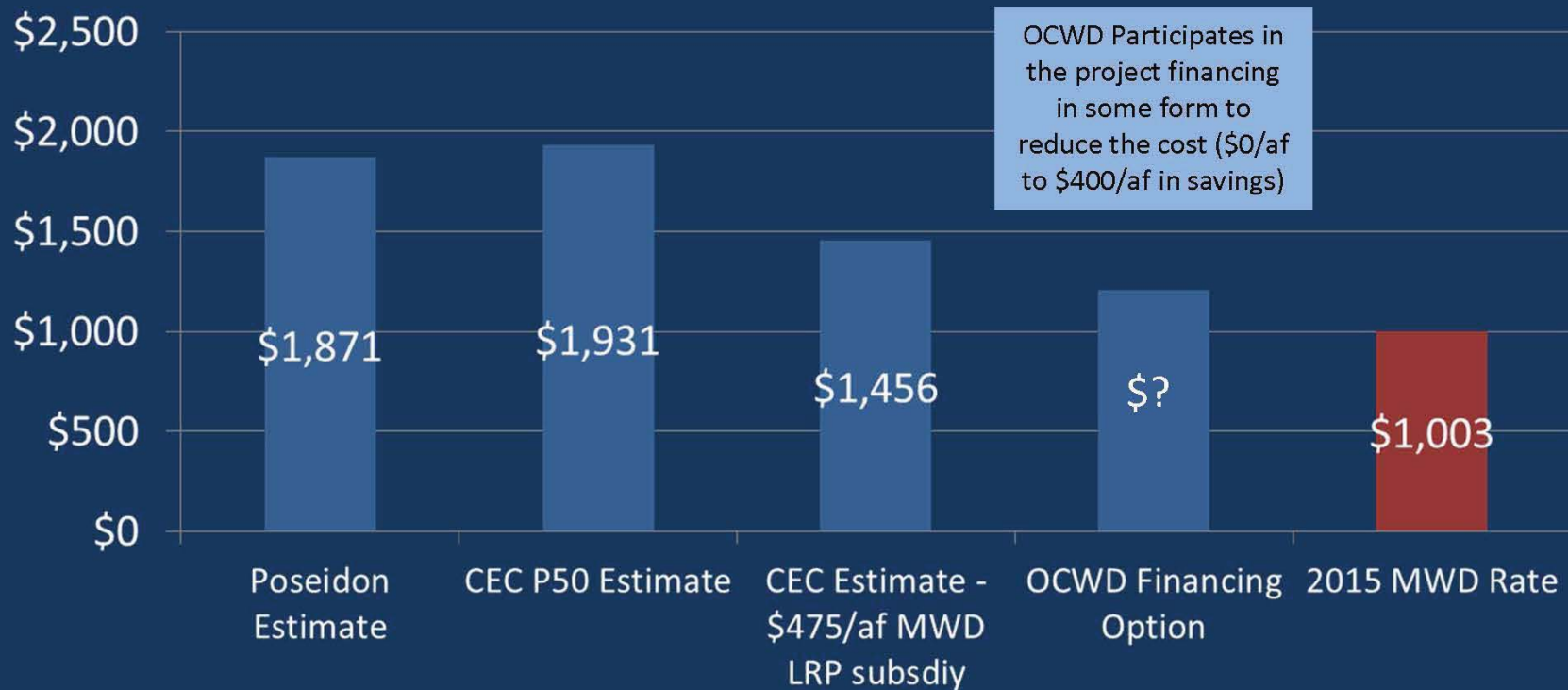
## Background

- Spring 2013 – OCWD began considering proposed project
- January 2014 – OCWD staff provided report to Board describing project
- October 2014 - Clean Energy Capital provided financial report to Board
  - Different options exist on how OCWD could participate in project
  - Provided a range of estimated unit prices





# 2014 Project Unit Cost Estimate





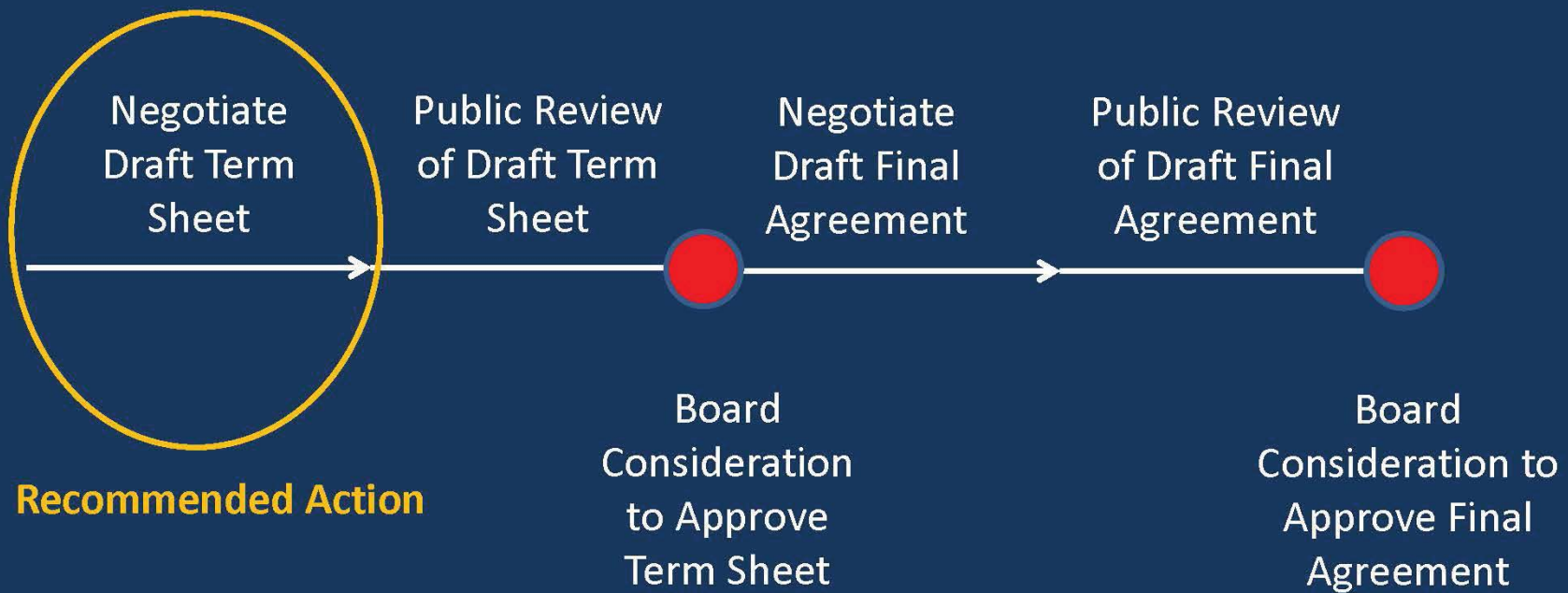


## Begin Negotiations for a Term Sheet

- Negotiate a draft term sheet that would provide the business terms of how OCWD and Poseidon could partner to develop the project
  - Price of the water
  - Who constructs, owns and operates the plant
  - Who constructs, owns and operates the distribution system
  - How will the project be financed
- For 56,000 acre-feet per year of water
- Provides a more detailed business arrangement that the public can comment on
- Report back to the Board no later than the March 18, 2015 Board meeting



# Term Sheet - Final Agreement Process





# Citizens Advisory Committee

- The District originally considered establishing an ocean desalination Citizens Advisory Committee (CAC) in July 2013
- Applications for the committee were solicited and reviewed
- However in January 2014 it was decided to defer consideration of such a committee
- Given staff's recommendation to begin negotiating a term sheet, staff also recommends establishing the CAC committee



# Citizens Advisory Committee

- Each Board member would appoint maximum of two individuals to sit on the CAC
- Inform the General Manager of the appointments by January 15, 2015
- Staff would report the CAC members to the Board on January 21, 2015
- Staff would administrate the CAC meetings





## Citizens Advisory Committee

- The general purpose of the CAC is to allow for a full discussion and debate of issues regarding the proposed project in a relatively informal setting that will provide information and suggestions to assist the OCWD Board in evaluating the proposed project,
- Meetings would be scheduled for February 25, March 25, and April 22, 2015 at 5:30 in the evening. Additional meetings will be scheduled if/as needed.



# Staff Recommendations

1. Direct staff to begin negotiating a term sheet with Poseidon Resources to purchase the 56,000 acre-feet per year of water created by the Huntington Beach Ocean Desalination project, and
2. Report back to the Board no later than the March 18, 2015 Board meeting on the progress of the negotiations, and
3. Establish a Citizens Advisory Committee with each Director appointing up to two members to the Committee

## AES Plant Information and Update

Built in the late 1950's and early 60's, the 450 MW power plant in Huntington Beach has been a source of energy throughout Southern California for decades. Along with the Alamitos and Redondo Beach generating facilities, AES purchased the Huntington Beach plant from Southern California Edison in 1998. In June 2012, AES sought approval from the Energy Commission to construct the Huntington Beach Energy Project (HBEP) at the existing AES Huntington Beach site. The new project will be constructed within the existing footprint of the currently operating plant. The proposed HBEP will be a 28.6-acre natural-gas-fired, combined cycle and air-cooled electrical power plant facility to provide a reliable source of electricity to the region.

In Fall 2010, the State Water Board (SWB) approved the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (OTC Policy). This policy requires 19 existing power plants, including Huntington Beach, that have the ability to withdraw water from the State's coastal and estuarine waters using once-through cooling to either reduce intake flow and velocity (Track 1), or reduce impacts to aquatic life comparably by other means (Track 2). HBEP will follow SWB's Track 1 alternative by replacing four existing steam-powered electric generating units with two new power blocks.

To ensure continuous operation of the plant, the demolition of the existing generating units and the construction of the new power blocks will be performed in two phases. While the OTC Policy states full compliance must be met by December 31, 2020, AES has submitted a request for an extension for the final compliance of Units 1 and 2 to December 31, 2022. Table 1 shows the schedule of compliance with the OTC Policy.

Table 1. Schedule of Compliance with OTC Policy

<b>Task</b>	<b>Compliance Date</b>
1. Submit Workplan for OTC compliance under Track 1.	December 1, 2015
2. Submit first progress Report on compliance actions.	December 1, 2016
3. Submit second progress Report.	December 1, 2017
4. Submit third progress Report.	December 1, 2018
5. Submit fourth progress Report.	December 1, 2019
6. Achieve full compliance with Units 1, 2, 3 and 4.	December 31, 2020

Should the extension be granted, AES estimates the project to take 90 months to be completed, as represented in Table 2.




Table 2. HBEP Proposed Schedule

<b>Demolition/Construction Activity</b>	<b>Timeline</b>
Demolish Unit 5, fuel tanks and Units 3 & 4 stack	Q1 2015-Q2 2016 (15 months)
Construction Power Block 1	Q3 2016-Q4 2018 (30 months)
Commercial Operation Power Block 1	Q4 2018 or Q1 2019
Demolish Units 3 & 4	Q1 2016-Q1 2018 (27 months)
Construction Power Block 2	Q3 2018-Q2 2020 (28 months)
Commercial Operation Power Block 2	Q2 or Q3 2020
Demolish Units 1 & 2	Q4 2020-Q3 2022 (24 months)
Construction of buildings 33 & 34	Q3 2021-Q3 2022 (14 months)

Once completed, the new 939 MW plant will provide cleaner more reliable energy. It will also have improved its curb appeal by replacing the existing 240' stacks with 120' stacks and incorporating Huntington Beach's surf culture with its beach theme exterior, including giant surfboards and waves.

## MEMORANDUM

**TO:** Board of Directors  
Orange County Water District

**FROM:** Joel D. Kuperberg, General Counsel 

**DATE:** December 3, 2014

**FILE NO.:** 022499-0078

**RE:** Issues Relating to District's Legal Authority to Purchase, Store and Sell  
Desalinated Water

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This memorandum responds to the five questions posed on November 21, 2014 by the OCWD Board President, as a follow-up to the November 19, 2014 Board discussion of the upcoming Board of Directors workshop on certain issues relating to the possible purchase by OCWD of desalinated water from the proposed Poseidon desalination plant in Huntington Beach. Based upon our review of the Orange County Water District Act ("OCWD Act") and other applicable laws, the following are our conclusions to the five questions posed by President Dewane:

1. The District has the legal authority to increase the Replenishment Assessment in order to generate the revenue needed to purchase desalinated water from the Poseidon Huntington Beach desalination facility.
2. Subject to certain conditions and findings by the Board of Directors, the District has the legal authority to sell and directly distribute desalinated water to retail agencies within the District's boundaries.
3. It is questionable whether the District has the legal authority to sell desalinated water to agencies outside of OCWD's boundaries (*i.e.*, south Orange County); and, depending upon the facts, the District may have the legal authority to sell desalinated water to MWDOC for resale to agencies outside of the OCWD boundaries.
4. The District has the legal authority to cause desalinated water purchased by certain third parties to be stored within the Orange County Groundwater Basin for subsequent extraction by the party purchasing the desalinated water.
5. The District has the legal authority to purchase desalinated water and percolate the desalinated water into the Orange County Groundwater Basin.

OCWD, like all special districts, and in contrast to cities and counties, is a district of limited powers. As such, the District possesses only those powers expressly enumerated by law, and those implied powers necessary to the exercise of the powers expressly granted by law, *Crawford v. Imperial Irrigation District*, 200 Cal. 318, 334 (1927); *Carlton-Santee Corp. v. Padre Dam Municipal Water District*, 120 Cal.App.3d 14, 23-24 (1981). The only implied powers a district of limited powers possesses are those “essential to the limited, declared powers provided by its enabling act,” *Water Quality Assn. v. County of Santa Barbara*, 44 Cal.App.4<sup>th</sup> 732, 746 (1996); *Turlock Irrigation District v. Hetrick*, 71 Cal.App.4<sup>th</sup> 948, 952-953 (1999). Consistent with these general legal principles, section 2(13) of the OCWD Act provides in pertinent part that the District has the power “to do all acts necessary for the full exercise of the foregoing [i.e., expressly enumerated] powers.” Consequently, OCWD’s power to take action is generally limited to the authority provided by the OCWD Act, or other statutes granting legal authority either to OCWD specifically, or to local governmental agencies generally.

1. The District has the legal authority to increase the Replenishment Assessment in order to generate the revenue needed to purchase desalinated water from the Poseidon Huntington Beach desalination facility.

Section 23 of the OCWD Act provides that the revenues raised by the imposition of the Replenishment Assessment “shall be used to acquire water and to pay the costs of initiating, carrying on, and completing any of the powers, projects and purposes for which this district is organized.” Accordingly, section 23 authorizes the District to use Replenishment Assessment revenues to purchase water.

Section 2(6) provides that, “for the purpose of managing the groundwater basin and managing, replenishing, regulating and protecting the groundwater supplies within the district,” the District has the power to “Appropriate and acquire water and water rights” (subsection (d)), “Purchase and import water into the district,” (subsection (e)), and “Buy and sell water at such rates as shall be determined by the board of directors” (subsection (g)). The OCWD Act does not either enumerate the sources of water that the District may purchase or restrict the District from purchasing certain sources or types of water. Therefore, the District has the legal authority under sections 2(6) and 23 of the OCWD Act to use Replenishment Assessment revenues to purchase desalinated water from the proposed Poseidon project.

2. Subject to certain conditions and findings by the Board of Directors, the District has the legal authority to sell and directly distribute desalinated water to retail agencies within the District’s boundaries.

Pursuant to section 2(6)(g) of the OCWD Act, the District has the legal authority to “. . . sell water at such rates as shall be determined by the board of directors,” so long as the District conducts such water sales “for the purpose of managing the groundwater basin and

managing, replenishing, regulating and protecting the groundwater supplies within the district.” The OCWD Act does not restrict the source or “type” of water that the District may sell. Accordingly, the District may sell and directly distribute desalinated water to agencies within the District’s boundaries so long as the District finds that the sale of the desalinated water will facilitate management of the groundwater basin or the regulation or protection of groundwater supplies within OCWD.

In addition to selling water, OCWD has the authority both to “Provide for the conjunctive use of groundwater and surface water resources within the district area,” and to “Distribute water to persons in exchange for ceasing or reducing groundwater extractions,” OCWD Act sections 2(6)(a), 2(6)(i). Distributing water for conjunctive use purposes, or to reduce groundwater extractions, does not require the explicit finding that must be made in order to “sell water” pursuant to subsection (g) of that statute.

While the OCWD Act would allow the District to sell desalinated water to retail agencies within the boundaries of OCWD, such sales may expose the District to liability under other laws. The sale of desalinated water by OCWD to retail water agencies within the District’s boundaries would constitute a service analogous to wholesale delivery of water. However, the territory within OCWD’s boundaries is also within the wholesale water boundaries of MWDOC, and the provision of desalinated water deliveries by OCWD within MWDOC’s service area for treated imported water service would constitute a “duplication of facilities” under Public Utility Code section 1501, *et seq.*

Public Utility Code section 1505.5 provides that a water agency that provides or extends water service to territory being lawfully served by another agency that has designed and constructed facilities to provide the “same type of service” can be held liable to pay damages equal to the fair market value of the facilities being stranded by the original water agency when the new agency extends its service. Given that desalinated water is indistinguishable from other sources of potable water, it is assumed that the provision of desalinated water service to retail agencies would be “the same type of service” that MWDOC provides when selling imported water to those same retail agencies. Accordingly, unless OCWD reaches an agreement with MWDOC to permit OCWD to sell desalinated water to retail agencies that are within both the OCWD boundaries and the MWDOC service area, OCWD may have exposure for damages under the duplication of service provisions of Public Utility Code section 1501, *et seq.*



3. It is questionable whether the District has the legal authority to sell desalinated water to agencies outside of OCWD's boundaries (i.e., south Orange County); and, depending upon the facts, the District may have the legal authority to sell desalinated water to MWDOC for resale to agencies outside of the OCWD boundaries.

It is questionable whether OCWD has the legal authority to sell water – whether desalinated or otherwise – outside its boundaries. First, the District generally has only limited authority to act outside its boundaries. The OCWD Act expressly authorizes the District to act outside its boundaries in only six instances:

- Section 2(4) authorizes the District to acquire land within or outside its boundaries.
- Section 2(5) authorizes OCWD to construct, acquire, operate and maintain facilities within or outside the District to protect the underground basin or the quality of the District's groundwater supplies.
- Section 2(6)(b) specifies that the District may store water within or outside the District.
- Section 2(6)(d) authorizes OCWD to appropriate and acquire water and water rights within and outside its boundaries.
- Section 2(7) authorizes the District to provide for the protection and enhancement of the environment within and outside the District, in connection with its water activities.
- Section 2(10) provides that the District may exercise the power of eminent domain for right-of-way purposes outside the District boundaries but within the Santa Ana River watershed.

With the exception of these six activities that are specifically authorized outside of the District's boundaries, all of the powers granted by the OCWD Act implicitly must be exercised within the jurisdictional boundaries of the District. Because the OCWD Act does not authorize the District to sell water outside its boundaries, a significant question arises whether OCWD has the authority to do so.

In addition, it is questionable whether the sale of water by OCWD outside its boundaries – even if authorized by the OCWD Act – would satisfy the groundwater management conditions required by the Act. As noted above, while OCWD has the authority under section

2(6)(g) to sell water, that power may only be exercised “for the purpose of managing the groundwater basin and managing, replenishing, regulating and protecting the groundwater supplies within the district.” Assuming that the OCWD Act otherwise allows the District to sell water outside its boundaries, section 2(6)(g) requires that OCWD show that the extraterritorial sale of water would somehow serve the purpose of managing the District’s groundwater basin or managing, regulating or protecting the District’s groundwater supplies.

Further, legislation other than the OCWD Act appears to restrict the District’s power to sell water outside its boundaries. Under Government Code section 56133, an agency may not provide a new or extended service outside its jurisdictional boundaries unless it first obtains written approval from the Local Agency Formation Commission (“LAFCO”). That statute seemingly allows LAFCO to authorize a new or extended extraterritorial service provision only under two circumstances: Pursuant to section 56133(b), LAFCO may authorize new or extended extraterritorial service to lands within the service provider’s sphere of influence, in anticipation of a later annexation of that territory to the service provider. And, under subdivision (c) of that statute, LAFCO may authorize new or extended service to territories outside a service provider’s sphere of influence to respond to “an existing or impending threat to the public health or safety of the residents of the affected territory.” It does not appear that OCWD can meet the conditions in either subdivision (b) or (c) for LAFCO approval of extraterritorial service.

Government Code section 56133(e) sets forth three circumstances under which the new or extended provision of extraterritorial service is not subject to LAFCO approval. First, the statute does not apply to contracts involving two or more public agencies where the public service to be provided “is an alternative to, or substitute for, public services already being provided by an existing public service provider and where the level of service to be provided is consistent with the level of service contemplated by the existing service provider.” This exception appears to cover situations where one service provider voluntarily relinquishes the entirety of its service provision to a new provider. In the instant case, however, OCWD would not be supplanting the wholesale water service being provided by MWDOC to south Orange County. Second, section 56133 does not apply to contracts “for the transfer of non-potable or non-treated water”; in the instant case, however, the desalinated water is treated potable water. Finally, the statute does not apply to agreements providing “surplus water” to agricultural lands and facilities, or for projects that serve conservation purposes or directly support agricultural industries. In the instant case, it is doubtful that OCWD could find the desalinated water to be “surplus,” and it will not be served (in any appreciable amount) for agricultural or conservation purposes. Consequently, it does not appear that OCWD’s proposed sale of desalinated water outside its boundaries either is exempt from, or would qualify for, the LAFCO approval required by Government Code section 56133.

Finally, assuming it could satisfactorily address the extraterritorial sale of desalinated water under the OCWD Act and for the purposes set forth in section 2(6), and obtain approval



for extraterritorial services from LAFCO pursuant to Government Code section 56133, the provision of that service within MWDOC's service area would implicate the "duplication of facilities" provisions of Public Utility Code section 1501, and expose the District to condemnation-like damages under section 1505.5, in the absence of an agreement with or consent from MWDOC. However, if OCWD were to enter into an arrangement to sell desalinated water to south Orange County agencies by selling the water to MWDOC at a point of sale within OCWD's boundaries, and MWDOC then re-sold the water to the south Orange County agencies, the arrangement would avoid most of the legal impediments described above to OCWD directly selling desalinated water to those agencies. The sale of desalinated water through MWDOC would avoid any issue of the OCWD Act limiting most District actions to within the OCWD boundaries, would obviate the need for LAFCO approval and would resolve any concerns regarding OCWD exposure to damages from MWDOC for "duplication of facilities." However, the sale of desalinated water to south Orange County agencies through MWDOC would not resolve the requirement under section 2(6)(g) that the sale of water by OCWD serve the purpose of "managing the groundwater basin and managing, replenishing, regulating and protecting the groundwater supplies within the district. . ."<sup>1</sup>

4. The District has the legal authority to cause desalinated water purchased by certain third parties to be stored within the Orange County Groundwater Basin for subsequent extraction by the party purchasing the desalinated water.

The OCWD Act specifically authorizes the District to enter into agreements with third parties for the third party storage of water within the Orange County Groundwater Basin. Section 2(6)(c) generally authorizes the District to "regulate and control the storage of water and the use of groundwater basin storage space in the groundwater basin. . .," and section 2.1 specifically authorizes OCWD to enter into groundwater storage agreements. Section 2.1(b) provides that groundwater storage by third parties is a secondary use of the Orange County Groundwater Basin, with the use of the basin for the purpose of managing and replenishing the District's groundwater supplies having the highest priority. Section 2.1(c) provides that OCWD may enter into groundwater storage contracts with public and private entities that are located either wholly or partially within OCWD; however, "where the primary benefits accrue to persons or property within the district," OCWD may contract to allow other parties – with the OCWD

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<sup>1</sup> It should be noted that OCWD could also structure the sale of desalinated water by means of water sales to one or more of its producers (e.g., IRWD), for resale by those producers to south Orange County agencies. Such an arrangement would address the OCWD Act restriction on extraterritorial activities and the need for LAFCO approval, but would not resolve either the concern regarding exposure to damages to MWDOC for duplication of facilities, or the requirement that the sale of the water be for the purpose of managing the groundwater basin or managing, replenishing, regulating or protecting the groundwater resources within OCWD.



Act specifically identifying MWD and DWR – to store water within the Orange County Groundwater Basin.

Section 2.1 of the OCWD Act does not contain any restrictions or limitations on the District's ability to contract for third party storage of water within the groundwater basin, other than requiring that the basin be used for replenishing and managing the District's groundwater supplies as a first priority (§ 2.1(b)), and the requirement that the District must both consider and protect the quality of the groundwater and reasonable water supply needs of the District when considering groundwater storage agreements and impose such limitations on the quality of water to be stored as is necessary to protect the quality of the groundwater basin (§ 2.1(e)). Section 2.1(d) authorizes the District to waive the imposition of Replenishment Assessments and Basin Equity Assessments on stored water, and does not limit or require any specific terms to be included in a groundwater storage agreement, other than the above-referenced acknowledgment of the water supply needs of the District and the management and replenishment of the basin.

Based on the foregoing, OCWD has the authority to enter into groundwater storage agreements to store desalinated water, but is limited into entering into such contracts with entities other than the District's producers unless the District can find that the "primary benefits" of the storage arrangement will accrue to persons or property within OCWD.

5. The District has the legal authority to purchase desalinated water and percolate the desalinated water into the Orange County Groundwater Basin.

As noted above, the District has the authority under sections 2(6)(d), (e) and (g) of the OCWD Act to purchase water for the purpose of managing the groundwater basin and replenishing and protecting the groundwater supplies within OCWD. In addition, OCWD Act section 2(6)(b) expressly provides that OCWD has the authority to "Store water in underground basins or reservoirs within or outside the district," and section 2(6)(j) authorizes OCWD, among other actions to improve and protect the groundwater supplies, to inject water into the basin. As noted above, the OCWD Act does not distinguish between sources and types of water that the District may buy, such that the District has the authority to purchase desalinated water, in the same way that it may purchase imported water, for replenishment purposes. Accordingly, the District has the authority to purchase desalinated water for the purpose of percolating it into the groundwater basin for replenishment purposes.

\* \* \*

I look forward to discussing these issues with the Board of Directors, and addressing any questions that Boardmembers may have.