



**TAP**International

# Final Report

**DISTRICT COUNSEL'S  
OFFICE CAN BENEFIT  
FROM ENHANCED  
STRUCTURE AND  
IMPROVED MANAGEMENT  
PROCESSES**

December 7, 2020

**Final Report by the Independent  
Auditor to the Board Audit Committee**



**Date:** December 7, 2020

**Memorandum For:** Board Audit Committee (BAC)

**From:** Independent Auditor, TAP International, Inc.

**Subject:** Transmittal of TAP International Performance Audit Report

Attached is our final report, *District Counsel's Office Can Benefit from Enhanced Structure and Improved Management Processes*. The audit objective was to identify potential structural, organizational, and procedural improvements in the District Counsel's Office.

Our audit identified opportunities to improve service delivery and performance through an enhanced operating strategy, implementing structural and process improvement changes. The report contains five recommendations that will enhance the efficiency and effectiveness of legal services provided to Valley Water's operational and administrative units.

A summary of agency responses to the recommendations in this audit report is included in Appendix A and the full response is included in Appendix B.

*TAP International, Inc.*

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A scenic landscape featuring a bright yellow text box overlaid on a background of rolling hills, a sea of clouds, and a bright sun in the sky. The foreground is filled with tall, golden-brown grass. The sky is a warm, golden-brown color with some wispy clouds and a bright sun on the right side. The text 'Section 1: Audit Highlights' is written in a bold, black, serif font within the yellow box.

# Section 1: Audit Highlights



# Audit Highlights

## Why the Audit Was Conducted

The Office of the District Counsel (District Counsel's Office) provides a myriad of legal services to Valley Water's Board of Directors (Board) and 80 operational and administrative offices, divisions, and units.<sup>1</sup> At the Board's direction, the Independent Auditor (Auditor) conducted a performance audit of the District Counsel's Office to identify potential structural, organizational, and procedural improvements.

## How the Audit Was Conducted

The performance audit included a review of the District Counsel's Office organizational structure, operational performance, staff roles and responsibilities, processes, and policies and procedures. The audit work included: (1) interviews with District Counsel's Office attorneys and staff, (2) interviews with the primary customers of the District Counsel, (3) analysis of financial data, contracts, consultant agreements,<sup>2</sup> and other documentation related to the District Counsel's Office operations, and (4) peer agency research on structure and practices. This performance audit used qualitative evidence, documentary evidence, and other performance information to assess overall agency effectiveness. The Auditor took additional steps to corroborate and substantiate qualitative information described in the report per generally accepted government auditing standards.

## What the Audit Found

Valley Water operations and administrative units generally agreed that the District Counsel's Office provides quality legal services, providing legal review, advice, and representation, but many of them raised concern about the frequency of communication and timeliness of services. This audit determined attorneys have managed and prioritized their projects and workflows without centralized processes or tools. Each attorney has been encouraged to be independent and operate their own legal service center. While this management approach provides high autonomy to attorneys and increases morale, it also creates non-uniformity in service delivery among Valley Water operational and administrative units and customer satisfaction concerns.

While there is not an established operating standard for public sector legal offices, best practices suggest that operating models are evolving from board-centric roles and as-needed support

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<sup>1</sup> Valley Water has 13 attorneys, risk and workers compensation managers and administrative support personnel supporting seven Directors serving on the Board and over 800 regular employees. The District Counsel's Office also outsources legal services.

<sup>2</sup> Also referred to as professional services agreements within Valley Water.

services on a task-by-task basis to enterprise-wide models that uniformly support organizations. This audit reports various strategies to update the District Counsel's Office current operating model consistent with best management practices as well as practices identified in other public sector legal offices, such as added policy and procedural development, use of added document templates, effective workflow management, use of master services agreements, service level agreements (SLAs), performance management systems, and implementation of multi-source feedback assessments (e.g. upward, downward, and lateral input on service delivery satisfaction to and from the department, customers, and other stakeholders). Implementation of these strategies would likely increase customer satisfaction.

## Recommendations (in priority order)

1. The District Counsel's Office should develop and implement a written strategy for approval by the Board that provides an updated operating model for efficient service delivery. In the development of the strategy, the District Counsel can consider, for example, enhanced policy and procedure development<sup>3</sup> and new/enhanced tools described throughout this report. These tools, for example, can include workflow management, SLAs, added performance measurement, use of multi-source feedback assessments, and risk-based criteria assessments.

### Estimated In-House Labor

- Strategy Development: 24 to 36 hours to discuss and agree upon potential enhancements.
  - Strategy Implementation: Costs are dependent upon the scope of the strategy developed.
2. The District Counsel and the Information Technology & Administrative Services Chief Operating Officer should update Valley Water Administrative Policies that (1) identify areas that require the development of new contractual and agreement templates, and (2) identify the responsible party for updating existing contract, agreement, and amendment templates as well as non-disclosure agreements (NDAs). These updates should also include the responsible party for NDA monitoring.

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<sup>3</sup> -Development of risk-based criteria for reviewing consultant agreements, purchase acquisitions, and/or other types of contracts.

-Development of criteria for prioritization and assignment of Board and Valley Water requests for services.

-Preparation (sources of information to be used) and maintenance of the Quarterly Report provided to the Board and the Litigation Matrix used to document current litigation status, which is part of the Quarterly Report.

-Clarification of EL 7.5 regarding the handling of Board member requests for the drafting of resolutions.

-Maintenance of the Legal Advice Matrix used to document the communication of advice provided to Valley Water management and staff.

-Personnel training requirements, including cross-training and succession planning.

-E-discovery procedures (currently in development).

-Criteria for risk management decision-making applicable to insurance.

Estimated In-House Labor

- Up to 36 hours to meet, confer, review, and approve updates to the administrative policies.

3. The District Counsel should convene a workgroup on planning activities or projects involving contracting opportunities with key stakeholders (E.g., Chief Executive Officer (CEO) and Chief Operating Officers (COOs)) to develop a decision-making guide for early engagement with the District Counsel Office and Risk Management.

Estimated In-House Labor

- Up to 24 hours to prepare for, facilitate, and document the working group meeting results.

4. The District Counsel should discuss with the Board the use of a master services agreement to add another procurement mechanism for legal services.

Estimated In-House Labor

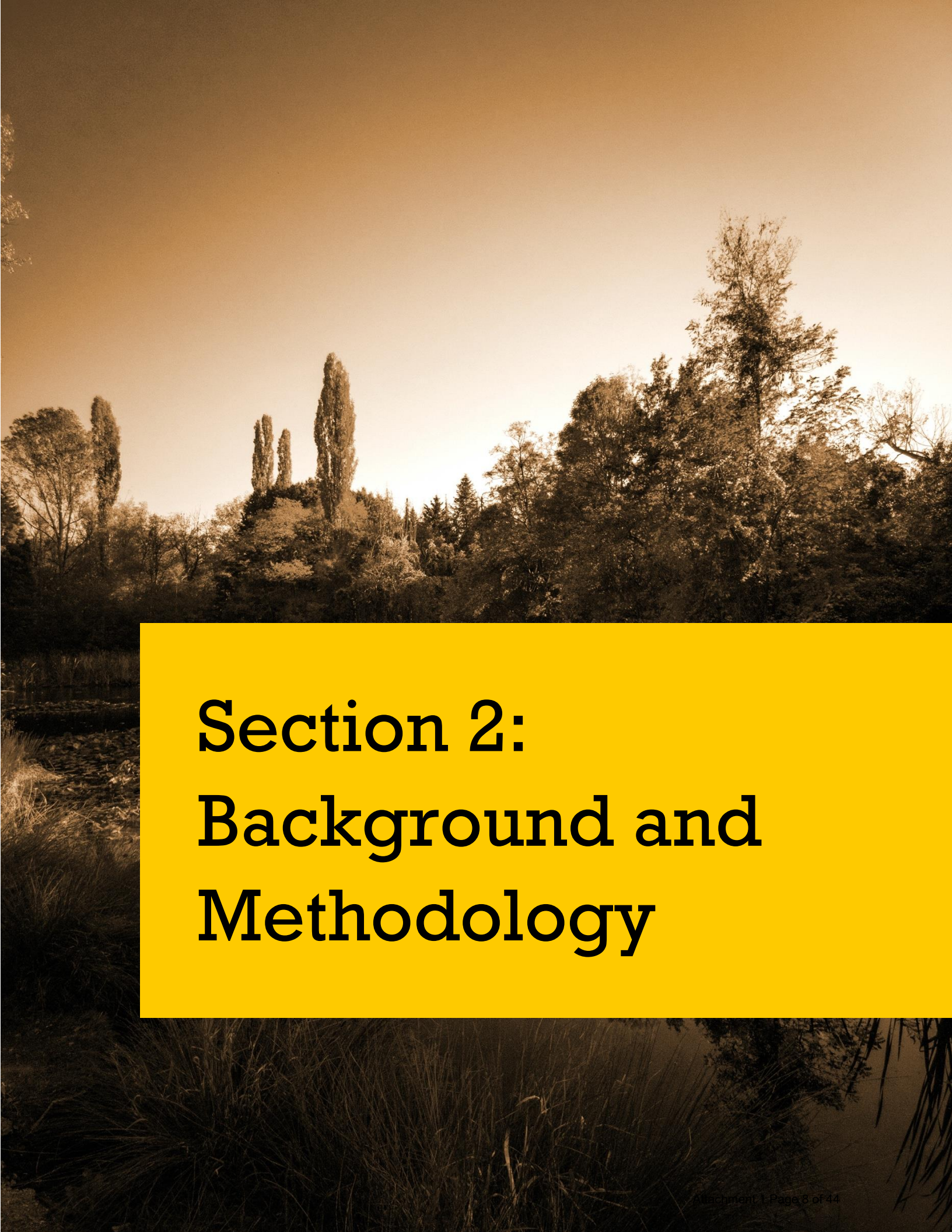
- Up to five hours for preparation of memo and Board discussion.

5. The Board Audit Committee should ensure that the scope of the audit currently proposed in the annual audit work plan for the risk management function, include an evaluation of the advantages and disadvantages of implementing alternative organizational alignments for the Risk Management Unit and the Workers' Compensation programs.

Estimated In-House Labor

- No labor cost for the District Counsel's Office.





# **Section 2: Background and Methodology**

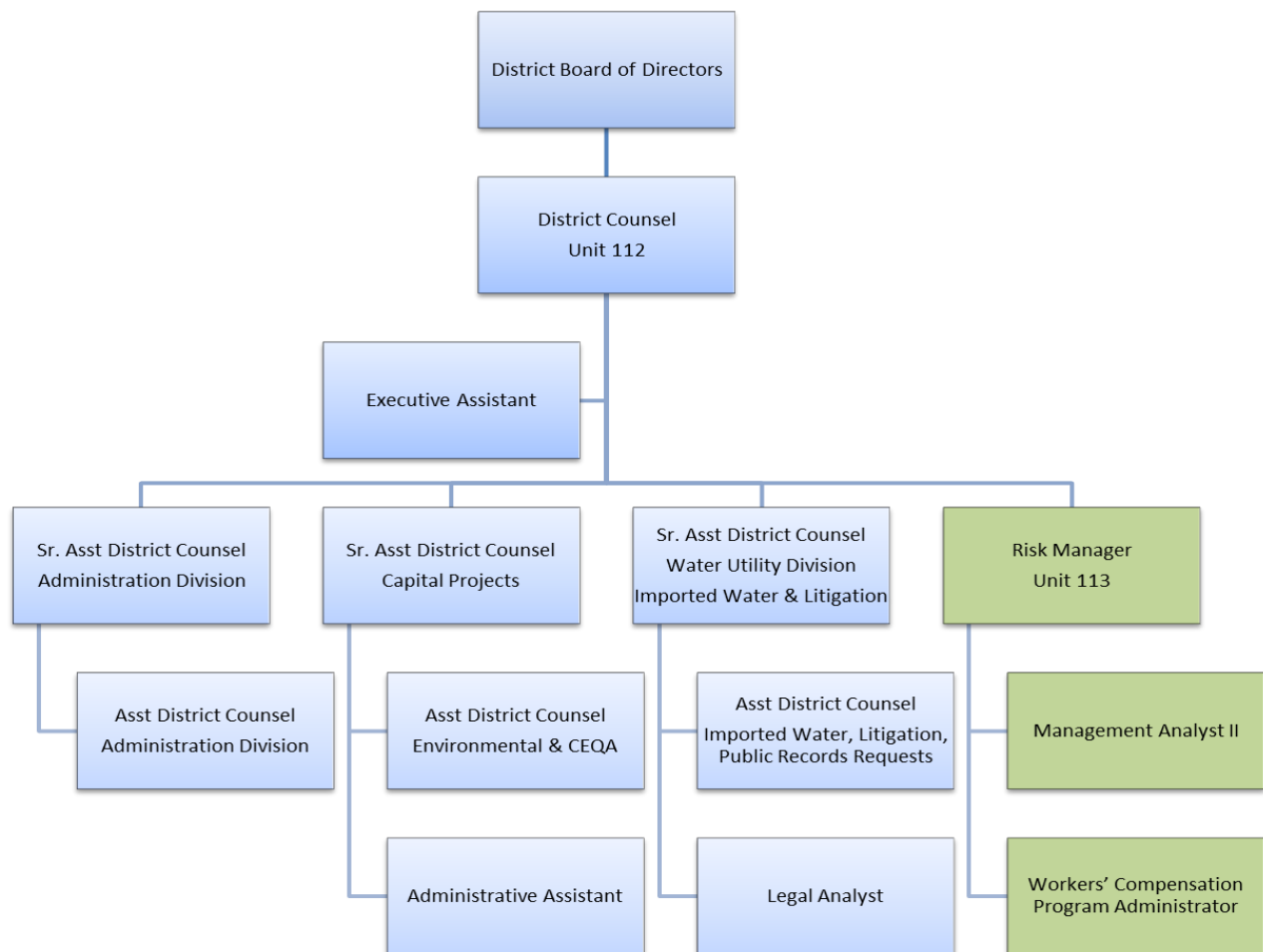


# Background

## To Whom Does the District Counsel's Office Report?

The Valley Water Board directly appoints the District Counsel, who serves at the discretion of and reports directly to the Board, as shown in Figure 1 below. In addition to the District Counsel, Valley Water has two other Board Appointed Officers (BAOs) who serve as part of Valley Water's executive leadership team: The CEO and the Clerk of the Board. The District Counsel, as a BAO, is expected to "provide high quality, trustworthy and responsive legal counsel to Valley Water in a manner that creatively helps accomplish Valley Water's mission." The current District Counsel was appointed in February 2010.

**Figure 1. Organizational Chart of the District Counsel's Office**



## How Should a Public Legal Counsel's Office Operate?

While multiple state and local laws guide District Counsel decisions, there is not an established standard for public legal offices that guide leaders on how day-to-day management should be performed. Public legal offices consistently report to an elected governing body with day-to-day strategies varying from limited organizational maturity to robust maturity that include use of formal SLAs, integration of legal support in enterprise-wide communication strategies, formal delineation of roles and responsibility, and embedding attorneys in specific departments. The size and complexity of the public agencies drive the maturity of the operating model.

Best practices for in-house legal service delivery recommend an exact operating model communicated within the legal office and with the rest of the agency. The strategy is based on the needs of the requestors of legal services (customers), defines the roles and responsibilities of all the parties, and the processes to support consistent service delivery.<sup>4</sup>

## What Services are Provided by the District Counsel's Office?

Nine staff members assist the District Counsel in providing legal services to Valley Water. Three additional staff support the Risk Management and Workers' Compensation programs. Key services, among others, provided by the Office address:

- Water rights,
- Construction contract and amendment review,
- Consultant agreement and amendment review,
- Procurement agreement review,
- Contract drafting and negotiation,
- Public procurement compliance,
- Employee labor agreements and human resource issues,
- Construction law,
- Real estate law,
- Environmental law,
- Litigation,
- Grant compliance,
- Finance law,
- Statutory interpretation,
- Open government and ethics issues,
- General legal advice,
- Workers' compensation, and

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<sup>4</sup> Deloitte Legal, "In-house Legal Service Delivery – Transform Your Legal Operating Model," 2020.

- Risk management and claims.

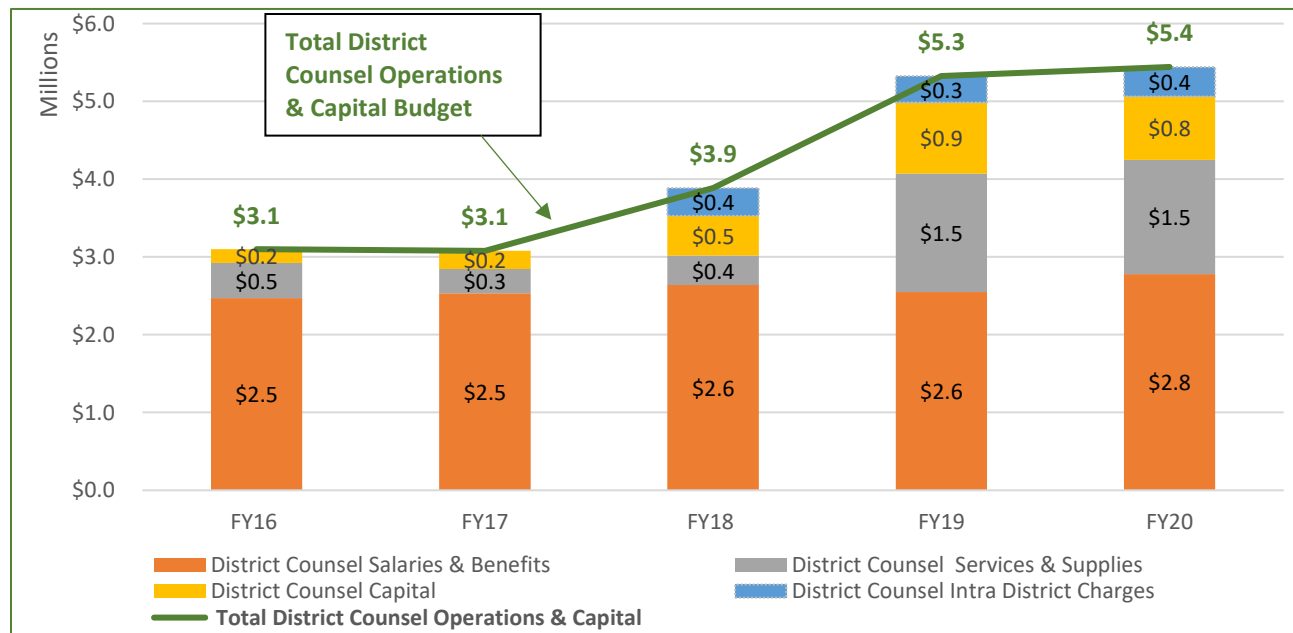
Valley Water does not maintain or track data that would show the volume or proportion of work performed by staff members among these types of services.

## How Much Does the District Counsel's Office Spend?

In fiscal year (FY) 2019, the budget to operate the District Counsel's Office was \$5.4 million, a growth of 76 percent since FY 2016, due to the expansion of Valley Water projects and operations.<sup>5</sup> As shown in Figure 2, (shaded in grey) services and supplies contributed to the increase. A detailed analysis of the budget showed an increase in outsourced legal services.

The District Counsel functions are budgeted through the general fund, which primarily receives funding through intra-district overhead charges to Watershed and Water Utility enterprise operations and capital programs. Valley Water's financial management officials said that the District Counsel's Office does not generally seek or receive separate reimbursement for services from other revenue sources.

**Figure 2. District Counsel's Office Budget, FY 2016 to 2020**



Source: Valley Water Budget Documents, <http://www.aqua.gov/archived-budget-documents-prior-years>

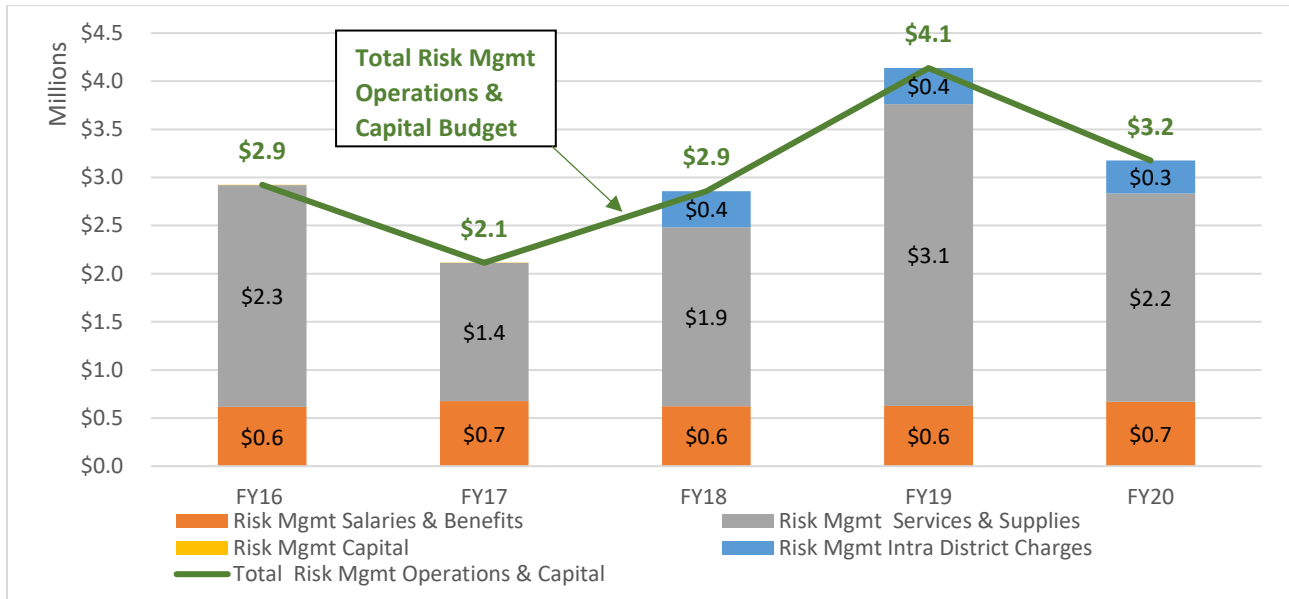
For the Risk Management Unit within the District Counsel's Office, the operating budget increased modestly by nine percent between FYs 2016 and 2020, as shown in Figure 3.

<sup>5</sup> Valley Water's total FY 2019 budget is \$529 million, and the Five-Year Capital Improvement Program includes 67 projects totaling \$6.5 billion.



The budgets for salaries & benefits for both the District Counsel's Office and the Risk Management Unit remained steady since FY 2016.

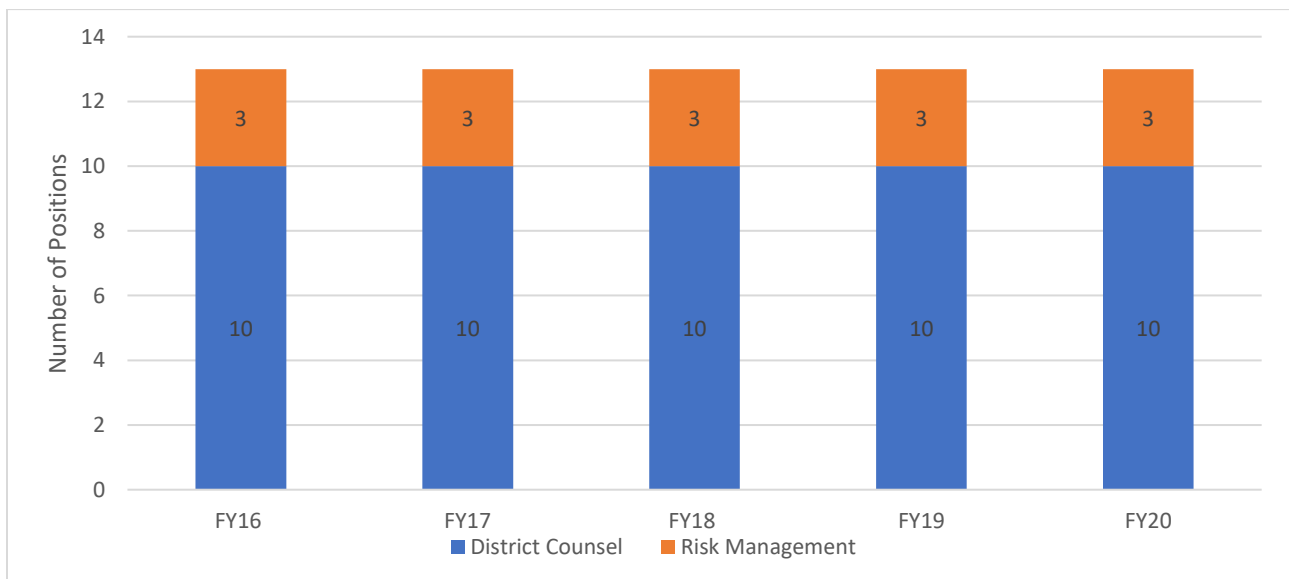
**Figure 3. Risk Management Unit Budget, FY 2016 to 2020**



Source: Valley Water Budget Documents, <http://www.aqua.gov/archived-budget-documents-prior-years>

Specifically, the number of budgeted positions in the District Counsel's Office and the Risk Management Unit did not change throughout the period, as shown in Figure 4.

**Figure 4. District Counsel's Office and Risk Management Unit Budgeted Positions, FY 2016 to 2020**



Source: Valley Water Budget Documents, <http://www.aqua.gov/archived-budget-documents-prior-years>

# **Methodology**

## **How was the Performance Audit Conducted?**

This performance audit assessed potential opportunities for structural, organizational, and procedural improvements in the District Counsel's Office. The audit examined the functions, structure, roles and responsibilities, and customer satisfaction of the District Counsel's Office's legal services to the Board and Valley Water management and staff in the operational and administrative units.

## **Audit Objective**

In 2018, Valley Water's Auditor conducted an enterprise-wide audit risk assessment and identified the District Counsel's Office as an area that could benefit from further review. Our specific audit objective was to determine and identify potential structural, organizational, and procedural improvements.

## **Scope of Work**

This specific audit examined the following areas:

- Roles and responsibilities of the District Counsel's Office.
- Valley Water Administrative Policies and other policies related to services provided by the District Counsel's Office.
- District Counsel's Office management structure and staff assignments.
- Customer service satisfaction and feedback.
- District Counsel's Office work processes, including:
  - Performance metrics and service levels
  - Time tracking and reporting
  - Succession planning
  - Contracting and use of outside legal firms (subject matter experts)
  - Use and maintenance of contract and agreement templates
  - Legal review of documents (contracts, agreements, amendments, etc.)
  - Use of NDAs
  - Use of District software systems
  - Information sharing and communications

The scope of the work did not assess whether legal documents and communications to the Board were properly classified because the District Counsel did not release these documents due to their privileged and/or confidential nature. This assessment is included on the annual audit work plan of the Auditor.

The scope of work also did not examine the efficiency of claims administration and management by the Risk Management Unit, which is also included on the annual audit work plan of the Auditor.

Finally, this audit did not include an assessment of any individual employee performance or a comparison of timeliness metrics with other peer agencies due to the absence of available data.

## Project Approach

To address the audit objective, the Auditor performed the following activities:

- Analyzed the District Counsel's Office Manual for areas of enhancement, such as the use of risk-based criteria, communication protocols, training, and e-discovery procedures.
- Evaluated the Valley Water organizational charts and budget documents.
- Assessed available contract and agreement templates to determine the different types available and their last revision dates.
- Analyzed 23 recent selected records from the Consultant Agreement System (CAS)<sup>6</sup> to determine the work performed by District Counsel attorneys for the review and approval of consulting agreements, and the types of edits made by attorneys.
- Computed turnaround times for the length of the review process for 23 consultant agreements.
- Reviewed the District Counsel's Office folder log-in sheets to evaluate the approval process.
- Interviewed all District Counsel staff to:
  - Discuss job functions and primary service areas.
  - Assess workflow processes between the District Counsel's Office and internal customers.
  - Identify performance metrics for the Office.
  - Identify areas of possible improvement.
- Interviewed each member of the Board to assess:
  - Satisfaction with District Counsel's Office services and timeliness.
  - Processes for information sharing and transparency.
  - Use of outside attorneys and subject matter experts.
  - Succession planning and staff assignments.
- Interviewed 17 District management and staff in the following 12 Valley Water operational and administrative offices, divisions, and units.
  - Clerk of the Board
  - Office of Talent and Inclusion
  - Dam Safety and Capital Delivery
  - Watersheds Design and Construction

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<sup>6</sup> CAS is Valley Water's in-house system for processing consulting agreements.



- Watersheds Stewardship and Planning
- Water Utility Capital
- Raw Water
- Water Supply
- Treated Water
- Information Technology and Administrative Services
- General Services
- Purchasing and Consultant Contracts Services

The purpose of the interviews was to:

- Determine the level of satisfaction with the District Counsel's Office services.
  - Assess workflow processes with the District Counsel's Office.
  - Evaluate communication protocols.
  - Identify areas of concern and possible improvement.
- Conducted a peer review of public legal offices to identify and compare structure and management practices. Five agencies were contacted – City of San Jose, Santa Clara Valley Transportation Authority (VTA), Metropolitan Water District of Southern California (MWD), San Diego County Water Agency, and East Bay Municipal Utility District (EBMUD). Two of these agencies agreed to provide additional information beyond what was contained on their website. Other information was obtained through the publicly available budget and financial documents. Other agencies were researched to respond to audit committee requests for information.

### **Assessment of the Reliability of Data**

Section 9.2 of generally accepted government auditing standards require auditors to describe limitations or uncertainties with the reliability or validity of evidence if: (1) the evidence is significant to the findings and conclusions within the context of the audit objectives; and (2) such disclosure is necessary to avoid misleading the report users about the findings and conclusions.

The District Counsel's Office does not routinely capture operating and workload data. In the absence of data related to consultant agreements, the Auditor collected and performed its analysis of CAS data and found it minimally adequate for the audit wherein a judgmental selection of recent consultant agreements from CAS was reviewed for comments, edits, and timeliness. As CAS only records the processing and review of consultant agreements and not construction contracts, procurement purchases,<sup>7</sup> or other documentation reviews, the results of our analysis cannot be projected to the entirety of the District Counsel's work.

### **Assessment of Internal Controls**

Section 9.20 of generally accepted government auditing standards require auditors to assess the adequacy of internal controls if they are significant to the audit's objectives. The objectives of

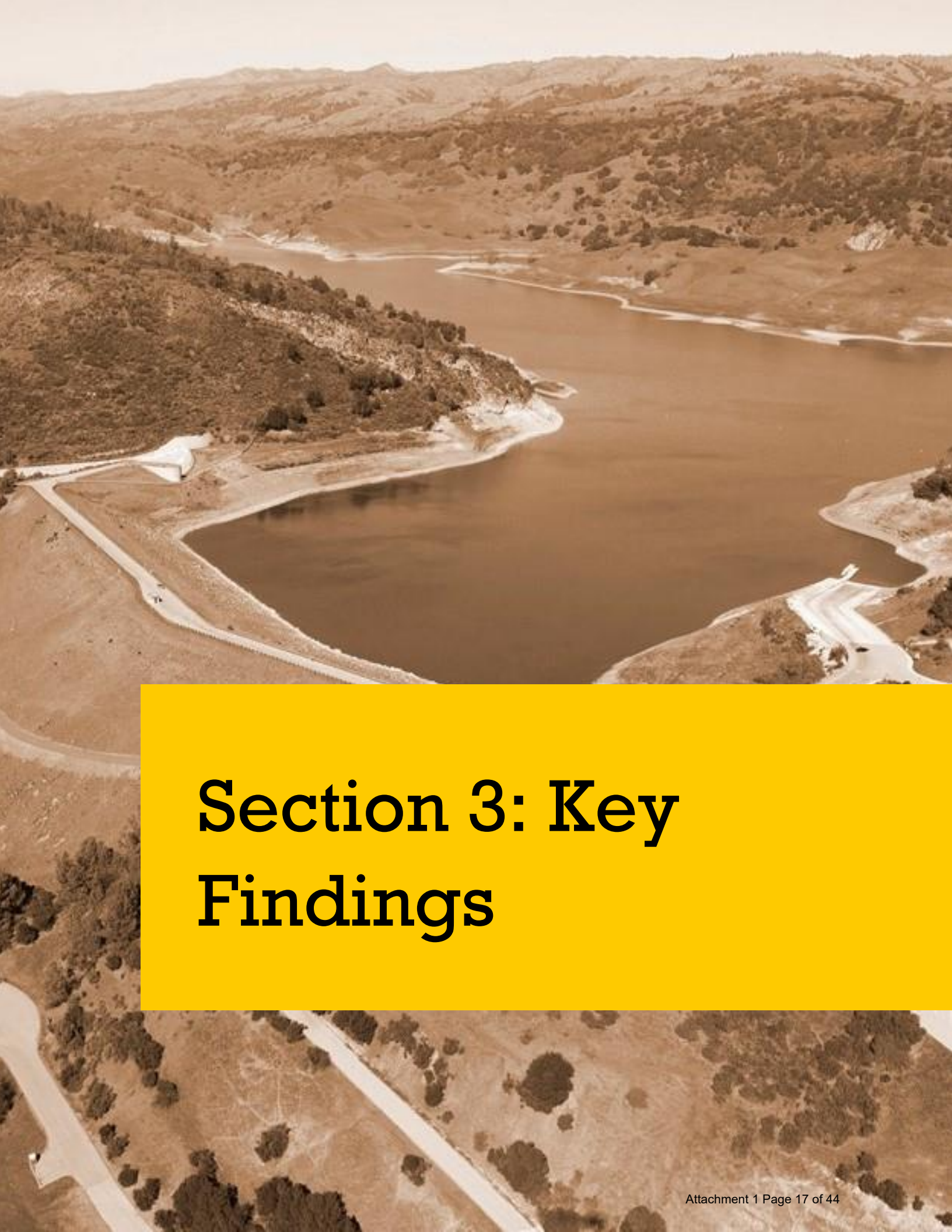
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<sup>7</sup> Supplies, equipment, software, etc.

this performance audit did not require an internal control assessment, but policies and procedures and other controls were reviewed to identify potential improvements.

### **Audit Statement**

This audit is known as a performance audit. A performance audit evaluates the economy, efficiency, and effectiveness of programs, services, and operations. The Auditor conducted this performance audit per generally accepted government auditing standards. Those standards require that the audit be planned and performed to obtain sufficient evidence to provide a reasonable basis for the findings and conclusions based on the audit objectives. The Auditor believes that the evidence obtained provides a reasonable basis for the findings and conclusions based on the audit objectives. A preliminary technical draft for review of its technical accuracy and a formal draft report for a response to formal recommendations were provided to the District Counsel's Office. Comments were incorporated as applicable throughout the report. [See Appendix A for the summary of agency comments to the recommendations included in this report and Appendix B for the full agency response.]



# Section 3: Key Findings



## **Finding 1: Customer Satisfaction is Mixed**

### **Customers report high satisfaction with the quality of services**

One standard performance measure to gauge operational performance is customer satisfaction. Nearly all the Board's Directors (six of seven) and most of the managers (10 of 14) across 12 operational and administrative units we interviewed, highly rated the quality of services provided by the District Counsel's Office. Staff from Human Resources, and those working on California Environmental Quality Act (CEQA), Fish and Aquatic Habitat Collaboration Effort (FAHCE), and water rights generally reported the highest satisfaction levels with the quality of service while Administrative Services reported being the least satisfied.

### **Valley Water managers want better communication on the status of services requested**

Eleven of 12 operational and administrative offices, divisions, and units were not as satisfied with communication activities by the District Counsel's Office. Our review found that the District Counsel's Office does not routinely provide regular status updates to Valley Water managers and staff about work requests. Communication strategies varied through ad-hoc (sometimes prompted, other times unprompted) verbal or email updates. Valley Water managers said the frequency and the quality of District Counsel Office communication is highly dependent upon individual attorneys; some were particularly good at updating them on the status of the work, while others said that communication seldom occurs unless there was direct outreach. District Counsel staff reported varying level of awareness about these communication concerns with some reporting being unaware that Valley Water operational and administrative units had communication concerns.<sup>8</sup>

### **Valley Water managers want faster service**

Eleven of the 12 operational and administrative offices, divisions, and units were also not as satisfied with timeliness by the District Counsel's Office. Valley Water managers and staff described multiple examples of service delivery with capital projects, real estate acquisitions, and other types of services that were delayed due to legal attorney review that took longer than expected to complete. While there is not an agreed-upon standard for timeliness, the turnaround times for legal review of 23 recent

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<sup>8</sup> The District Counsel submits a quarterly report to the Board of Directors, which serves as the only formal mechanism for status reporting, but the District Counsel said that this report does not include the status of individual work requests by Valley Water units.

professional service agreements ranged from 1 to 49 calendar days, averaging 17 calendar days.<sup>9</sup> Consulting agreements outside of our sample of 23 agreements took between four months to over a year for final review and approvals. District Counsel attorneys said they were unaware of management's concerns regarding timeliness. Other attorneys said they were aware of these concerns and described their proactive communication efforts.

### Valley Water and District Counsel’s Office share responsibility for timeliness issues

Valley Water departments, divisions, and units and the District Counsel's Office described different circumstances for longer than expected turnaround times. Nine of 12 Valley Water operational and administrative offices, divisions, and units attributed the delays to two key areas. First, Valley Water

managers reported that the reviewing attorney would require the use of a different contract template, although the managers believed they were using the correct template for their needs; some of them unknowingly used an outdated template because the District Counsel attorneys did not place the updated template on the Valley Water intranet. As shown in Figure 5 below, 32 percent of 190 legal review comments requested clarification or definition and another 12 percent commented on the use of non-standard contract language or incorrect templates among the consultant agreements. Second, Valley Water managers reported that delays occur when District Counsel attorneys request changes to the scopes of work, question costs and business-related decisions, as well as editing and format changes, including to documents that have been previously edited, rather than only focusing on legal or regulatory concerns. Figure 5 shows that 19 percent of legal comments addressed formatting suggestions or line edits, equating to about one in five comments. For example, the District Counsel’s Office attorneys corrected and commented on "typos" or noted that Valley Water units used an incorrect format to describe a list of tasks in the scope of work. District Counsel attorneys explained that many of their editing comments are necessary to help avoid future litigation. Contracts and Procurement staff explained that final review and verification of requested changes impact original processing schedules, creating bottlenecks, especially when multiple reviews occur.

**Figure 5. Types of District Counsel's Office Comments on Professional Services Agreements (Sample of 23)**

Type of Comment by the District Counsel Reviewer	Percent of Total
Needs clarification or definition	32%
Use of non-standard contract language, incorrect template/version	12%
Formatting suggestion or line edit	19%
Missing or incomplete element	13%
Extraneous or redundant materials; should be deleted or removed	9%

<sup>9</sup> The results of the professional services agreements reviewed cannot be projected to the full population of documents reviewed by the District Counsel’s Office. CAS only contains consultant agreements and no other types of documents reviewed by the District Counsel’s Office.

Flawed logical or inconsistent requirements	7%
Incorrect information	6%
Other	2%
<b>Grand Total (190 First Review Comments)</b>	<b>100%</b>

Source of data: Auditor Analysis

District Counsel staff attributed timeliness concerns to multiple issues, such as project managers submitting documentation that was not properly prepared, contracts that were improperly modified, or use of incorrect templates. The District Counsel attributes timeliness issues to insufficient staffing levels.

The Auditor verified that some timeliness concerns are due to the quality of documents submitted to the District Counsel’s Office for review that could have benefitted from line editing. Other timeliness concerns stem from applying the same level of attorney review for each professional services agreement regardless of the nature of or complexity of the proposed work. In other public agencies legal offices, application of risk-based management principals guide the level of review based on the evaluation of risk exposure. District Counsel attorneys verified that the same level of review was performed even when some agreements may have low risk of future litigation. A District Counsel attorney explained that each attorney has their own philosophy in reviewing contracts, and the philosophy of the Office is to protect Valley Water from potential litigation.

Contracting delays have a financial impact. Actual costs could not be determined because of the unavailability of data to perform a cost analysis.<sup>10</sup> Valley Water managers prepared a memo about five years ago, requesting authority to outsource legal services when needed to help prevent project delays. Under Valley Water Board Governance Policy EL-5, District Counsel has the authority to procure outside legal services when internal resources cannot efficiently meet organizational needs, provided the District Counsel informs the Board immediately of the procurement.<sup>11 12</sup> While the Auditor did not have available information to assess District Counsel procurement decisions, the District Counsel explained that outsourcing decisions are based on his discretion.<sup>13</sup> The Auditor noted that the District Counsel does not have formal written decision-making criteria for these procurement decisions.

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<sup>10</sup> A cost analysis would consider the amount of time spent reviewing contracts integrated with other data on project schedule delays due to contracting delays.

<sup>11</sup> Valley Water's Purchasing and Consultant Contracts Services Unit is not involved in these procurements or with ensuring compliance with procurement requirements.

<sup>12</sup> In FY 2018 the District Counsel’s Office budgeted \$1.1 million for outside legal services and by FY 2020, budgeted \$2.5 million.

<sup>13</sup> The District Counsel explained that he considers the availability of attorneys and the specialized expertise available.

## **Finding 2: Updating the District Counsel's Office's Operating Model Can Enhance Customer Satisfaction**

The District Counsel's Office can benefit from an enhanced operating model consistent with best practices to address service delivery issues such as timeliness, communication, and non-uniform approaches to providing services. The District's Chief Counsel explained that the Office's operating model is individual-centric in that each attorney determines how best to provide services. While this type of individual-centric operating model is not uncommon among public sector legal departments, others have more mature operating models to help sustain a consistent level of services. We describe potential strategies below that are designed to enhance service delivery.

### **Added policy and procedure development**

Policies and procedures serve as one key element of effective governance by forming the basis for an organization's internal control system. In other

words, policies and procedures help promote operational efficiency and effectiveness. The District Counsel's Office manual covers general areas of operations such as:

- Mission statement,
- Roles and responsibilities,
- Administrative policies,
- Office procedures, and
- Board communications.

Added procedural development could facilitate uniformity and transparency in decision-making and service delivery. Areas that need to be addressed in policies and procedures include:

- Development of risk-based criteria for reviewing consultant agreements, purchase acquisitions, and/or other types of contracts.
- Development of criteria for prioritization and assignment of Board and Valley Water requests for services.
- Preparation (sources of information to be used) and maintenance of the Quarterly Report provided to the Board<sup>14</sup> and the Litigation Matrix used to document current litigation status, which is part of the Quarterly Report.
- Clarification of EL 7.5 regarding the handling of Board member requests for the drafting of resolutions.

<sup>14</sup> Governance Policy EL 7.11 provides direction on the information the District Counsel will communicate to the Board but does not constitute an office policy and procedure which would guide the development, format, timing, and review of the Board's quarterly report.

- Maintenance of the Legal Advice Matrix used to document the communication of advice provided to Valley Water management and staff.
- Personnel training requirements, including cross-training and succession planning.<sup>15</sup>
- E-discovery procedures (currently in development).
- Criteria for risk management decision-making applicable to insurance requirements.<sup>16</sup>

## **Early District Counsel participation in planning activities**

There is not a policy or criteria that requires District Counsel or other support unit involvement for projects that are new to Valley Water, complex in design, or will likely have significant costs (E.g., over \$100 million). The District Counsel's Office is not involved in the review process during the development of requests for proposal or bids (which typically includes sample contract language) unless specifically requested by project management. The Auditor's review of 23 consultant agreements showed that 32 percent of comments involved requests for clarifications and definition, as shown in Table 5. These legal comments might have been prevented had the District Counsel's Office been involved earlier in the planning process. District Counsel attorneys reported that the first time they might see a request for proposal or contract is in the Legistar system when it needs to be reviewed just before Board review and/or approval. District Counsel attorneys said that they have previously advocated for early involvement in the planning process without success. However, another attorney said that it should be the project manager's and COO's decision to determine the need for early legal counsel involvement. Valley Water management has recently taken proactive steps on the Anderson Dam retrofit project to include District Counsel's Office participation in project planning meetings. Attorneys involved in these early planning meetings reported benefits from early risk assessment and proactive legal research.

Risk Management can also become involved earlier in the project planning process to help identify project risks and contractor insurance requirements, rather than consult at the project manager's discretion later in the project or during the contract negotiation phase. Efficient and effective project planning requires all stakeholders' participation and involvement so that any project issues can be identified and addressed as early in the process as possible

## **Added document template development**

A standard practice in government purchasing is the development and maintenance of template documents that can be used for different procurements. The templates contain standard language for terms and conditions and formatting designed to address different contracting needs. If used effectively, the templates can minimize the time required to review contracts. While the Valley Water District Counsel's Office attorneys reported

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<sup>15</sup> Training on succession planning would convey the importance of the three designated staff that could potentially assume the leadership position to receive requisite knowledge transfer.

<sup>16</sup> Presently, decisions can vary. Risk management staff acknowledged that some vendors had raised questions about the level of insurance required of them for activities that do not have a material risk to the agency.



having developed a standard set of templates, they also stated that Valley Water units often do not use the correct templates, resulting in extra legal review work of contracts and agreements, as previously described in Figure 5. Valley Water operational and administrative unit management stated that even though standard templates or templates from previously approved contracts or agreements are used, the District Counsel attorneys will edit the document language depending on the type of procurement or use the review and approval process to update the standard language.

Additional contract template development is needed to address all the types of services outsourced by Valley Water, such as for accounting/audit, staff support, marketing, other professional services, or different types of construction-related contracts. Valley Water management reported if a current template does not meet their needs, they will copy and paste language from other available contracts. With additional standard templates, Valley Water divisions and units could potentially minimize delays and frustration with the agreement and contract review process.

District Counsel and Valley Water management disagree over ownership for updating and maintaining the templates for contracts, amendments, and agreements. Most of the templates for standard consulting agreements available on Valley Water's intranet had not been revised since the calendar years 2016 and 2017. The last known agreement to be updated was the Capital Consultant Contracts Standard Consultant Agreement in 2018. District Counsel attorneys explained they are responsible for the review and approval of legal agreements; Government Relations is responsible for identifying necessary updates resulting from changes in California and federal legislation, and General Services is responsible for making the required legal changes to the documents. The General Services Purchasing Unit management, on the other hand, said it is not their responsibility because they do not have the legal expertise to make those types of changes.

Valley Water's Administrative Policy AD-6.3, "Approval Authority for Consultant Services Contracts," assigns responsibility to District Counsel to "develop, review and/or approve all standardized and customized contracts." The District Counsel explained this excludes the updates due to changes in laws.<sup>17</sup> The absence of formally defining the responsible party has led to inefficiencies in the contracting process. For example, a 2019 change in California law regarding small business enterprise preference in public construction contracts should have prompted a revision to Valley Water's templates. At the time of our review, the template had not been updated, even though District Counsel noted the need for a change in January 2020. In this instance, the general services unit had to repeat the request for proposal preparation process.

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<sup>17</sup> Implementation of AD 6.3 language is not included in the job description for the District Counsel likely contributing to the ambiguity of ownership. The District Counsel job description does state, however, that the District Counsel "monitors legal developments, including proposed legislation and court decisions related to water agency law and activities; evaluates their impact on District operations and recommends appropriate action." The job description language would reasonably include legislative and regulatory changes that affect contracting language in contract and agreement templates.

The District Counsel explained that the Office does not have the resources or time to monitor and identify the legal changes. Greater clarity about the responsible party to update contract templates could prevent the risk of undermining the integrity of the procurement process.

## **Workflow management processes and software**

High performing organizations use software applications to receive, track, and monitor services requests. The District Counsel's Office uses three Valley Water electronic systems to help track workflow for some of its activities. The CAS and Legistar<sup>18</sup> software applications alert the District Counsel's Office when documents require review; limitations in these systems do not allow the District Counsel's Office to examine the overall number of assignments, staff assigned to them, and the status of the review. Historically, the District Counsel's Office did have a work request system, but its use was discontinued years ago, according to the District Counsel, because it could no longer be supported technically. The third system – the Risk Management Information System (RMIS) – is used by the Risk Management Unit to manage claims. At the time of our review, Risk Management staff had a backlog of claims to enter, preventing real-time analysis of all current claims.

In the absence of robust workflow management software applications, the Auditor examined how workflow is currently managed. First, in the area of assigning work requests, the District Counsel's Office utilizes general guidelines. For example, one attorney is generally responsible for imported water and litigation, while another is responsible for environmental law. Generally, one attorney is assigned to one or more key areas with another attorney serving as a backup. The key issue with these guidelines is that any attorney could be assigned to work on requests by the Board, which are given top priority thereby delaying the completion of work requested by operational and administrative units. Valley Water staff explained they may or may not be informed of deliverable delays, resulting in dissatisfaction with the timeliness of legal services and creating uncertainty on overall project timelines.<sup>19</sup> One option that other public agencies have used is to have one or two specific attorneys dedicated to servicing Board requests and attending standing committee meetings while other attorneys would be dedicated to servicing specific divisions and units.

Second, in the area of managing work requests, the District Counsel's Office primarily relies on several manual processes to collect, manage, and track all other work requests. For instance, to track hardcopy documents requiring signatures, the District Counsel uses a manual paper log to record dates the documents are received, assigned, and completed. The workflow of other documents, such as construction contracts being prepared before bid or submittal through Legistar, are reviewed by District Counsel attorneys outside of either of these electronic workflow systems. A comprehensive electronic workflow application would better manage work requests by recording submittal and completion dates for all types of documents allowing the monitoring

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<sup>18</sup> Legistar is Valley Water's electronic system for processing documents being submitted to the Board of Directors.

<sup>19</sup> Due to the lack of quantifiable information collected on workflow and turnaround times, the exact impact of delays due to the re-prioritization of work due to Board requests is not known.

of the status of work requests by external customers. Having this information could also aid District Counsel management in continuous process improvements.

## Use of service level agreements

Best practices in service delivery between public agency departments encourage the use of SLAs.<sup>20</sup> SLAs define the services to be delivered by one department to another and helps reduce ambiguity in inter departmental service support levels. For example, an SLA for contract reviews between the District Counsel's Office and an operational unit would address:

- Agreed-upon completion dates for service
- Expectations for document quality prior to submission for legal review
- Scope of services to be provided (e.g. line editing and or legal risk)
- Communication protocols (e.g. frequency and content)

Expectation setting afforded by SLAs could improve timeliness. The absence of defined work performance expectations is a contributing factor for lower levels of customer satisfaction. District Counsel staff explained that the preparation of SLAs might be too time-consuming.<sup>21</sup>

## Better timekeeping system

Effective time tracking is a fundamental activity of all public agencies to ensure proper accountability and use of public funds. Timekeeping software applications are used in legal offices in both the public and private sectors, which allow a standard way to assess operating efficiency. The Office of the District Counsel has a time tracking application, but it is not configured to capture the type of data needed to perform staffing and financial analysis.<sup>22</sup> The District Counsel and attorneys provided various reasons for why they should not change how they track their time, such as:

- Staff maintain informal records for personal reference.
- The District Counsel's Office is a support service and should not be asked to track their time differently than other support departments.
- Providing privileged and confidential information about how their time is spent on activities to their customers could be problematic. In the private sector, time activity reports are classified as "privileged and confidential" to prevent the sharing of information to unintended parties.
- The Office's budget is not determined by time input.
- The Board has not asked the Office to formally track their hours.

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<sup>20</sup> Other examples of agencies include Los Angeles County, Sacramento County, City of San Diego, Sacramento City Unified School District, California Department of Justice, and the University of California Merced.

<sup>21</sup> The District Counsel's Office would need to consider if SLAs should be used for long term and/or short-term assignments.

<sup>22</sup>District Counsel staff currently record regular earning hours and leave time only.

The District Counsel added that time tracking would not likely result in increased funding to the Office, but staff has reported providing time records at the request of operations for invoicing purposes. The last verified instance of the reimbursement of attorney time was in February 2017. Comprehensive time tracking by the District Counsel's Office could potentially identify other reimbursement opportunities as well as provide the ability to effectively assign attorney workloads and right-size staffing levels.<sup>23</sup>

## **Management of non-disclosure agreements**

NDA's are an important legal structure used to protect information from being made available by the recipient of that information and are considered a legal contract. A party in breach of an NDA may be subject to legal action commensurate with the value of information. Like other public agencies, Valley Water sends and receives NDAs.

Standard management practices would, at a minimum, establish a standardized policy on the management and administration of NDAs, including defining roles and responsibilities for their compliance. A process to support the management of NDAs includes centralized maintenance, document tracking, compliance monitoring, and reporting. At the time of our review, Valley Water did not have a process for managing NDAs. Without a process, Valley Water does not know how many NDAs are in place, their nature, the signatory responsible for their compliance, or whether the District Counsel's Office has reviewed all of them. The District Counsel's Office said they are in the process of developing a formal policy for NDA management and administration. A target date has not been established for its completion.

## **Use of master services agreements**

Many public agencies use master services agreements<sup>24</sup> to implement public outreach that procures legal services for a wide range of subject matter and demonstrates conformance to public procurement requirements, including allowing for consistent and timely acquisition of services when needs arise. A master services agreement would involve developing a list of pre-vetted firms through a request for qualifications process to develop a master services agreement for all eligible firms. School districts, cities, counties, transit districts, water agencies, and retirement systems across California have issued bids to hire multiple legal firms to provide services.<sup>25</sup> The District Counsel explained that all the legal needs cannot be anticipated, defined, and incorporated into a master services agreement and that some type of "carve-out" will be

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<sup>23</sup> In our peer review of agencies, the MWD tracks legal time for multiple reasons – regular and reimbursable time – and the City of San Jose track attorney time for budgetary, litigation and program tracking . Examples of other agencies that track legal time include the Colusa County Counsel and the City of Sacramento.

<sup>24</sup> Competitive bid contract that establishes a list of pre-qualified and approved firms for a selected set of services.

<sup>25</sup> In our peer review of agencies, the MWD uses a master services agreement for specialized legal services. The San Jose City Attorney's Office is required to adhere to the same general purchasing requirements as other departments or offices. Other examples of agencies outside of our peer review that have bids soliciting multiple firms to contract legal services include the Los Angeles County Employee Retirement Association, Sonoma County, Paramount School District, Los Angeles Metropolitan Transportation Authority, the County of Ventura, the Los Angeles Unified School District, Azusa Unified School District, South Orange County Community College District, and the California State Treasurer's Office.

needed for emergency procurements. The District Counsel added that Valley Water is unlikely to realize cost savings because the pool of available firms with water rights experience is very small and too specialized to have standard rates. Finally, the District Counsel also expressed concern about the limitations in the firms that can be retained due to possible conflicts of interest and their providing representation for an opposing legal party. A master services agreement is designed to have a broad reach, to provide a range of hourly costs, and to identify all eligible local, regional, and national firms that can avoid having these types of conflict of interest issues.

### **Use of added performance measures**

Widely used in the public sector, regardless of the department's mission, performance measurement is the process of collecting, evaluating, and reporting information that can provide management with a quantifiable operational assessment of efficiency and effectiveness. The District Counsel's Office uses one formal performance measurement – the submission of Quarterly Reports as the sole performance metric for operational performance.<sup>26</sup>

Other performance measures can be developed, such as turnaround times and volumes of documents, projects, or cases reviewed, which help Valley Water identify and correct possible process bottlenecks. District Counsel staff raised concern, however, that tracking performance measures could adversely influence attorneys' decision-making so that organizational performance could look more favorable. An effective set of performance measures would address this concern by including qualitative and quantitative metrics to assess tangible and intangible benefits from service delivery.

### **Use of a multi-source assessments**

The District Counsel also raised concern that Valley Water's Board Appointed Officer (BAO) Performance Evaluation Procedure, Document Number Q622D02<sup>27</sup>, already establishes the agreed upon evaluation criteria for assessing the District Counsel's performance. The Auditor identified that the purpose of the document is to guide the Board in assessing BAO employee performance, which is different from implementing performance management principles to guide day-to-day managerial decision-making based on routine operational performance measurement.

A best practice in assessing operational effectiveness is to collect and evaluate feedback from stakeholders that provide or receive services from an office or unit. Implementation of a multi-

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<sup>26</sup> These quarterly reports are prepared manually by the District Counsel's Office because the Office does not have available off-the-shelf software applications that could generate these reports electronically. The labor costs involved in manual preparation is unknown because of the absence of utilizing time tracking systems. Organizational performance measurement/management software is widely available or simple database development of key performance measures could be developed in house based on any number of performance measurement frameworks, such as the Balanced Score Card approach or a Results Based Management Framework.

<sup>27</sup> The criteria is limited to the Board's annual evaluation of individual BAO performance related to Leadership, Strategic Planning, Customer/Partner Focus Monitoring Organizational Performance, Workforce Focus, Financial, Communication and Support to the Board, and Business Results.



source assessment is an effective and anonymous tool that supports a culture of continuous process improvement.

Receiving and providing feedback (on an annual basis) between the District Counsel's Office and its customers could allow the Office to be aware of the services and areas that need improvement, as evidenced by some attorneys reporting that they were unaware of the communication issues between the District Counsel's Office and the Valley Water divisions and units.

The District Counsel said that a multi-source assessment might pose potential legal conflicts with the Board Governance Policy II. Section 3.2 of the Board BAO Linkage asserts that "The Board, as a whole, will not evaluate, either formally or informally, any employee other than the BAOs". Section 5.5 of the policy further states,

"Monitoring of each BAO's job performance will be against the expected BAO job output: accomplishment of the duties for which he/she is accountable to the Board, and performance within the applicable limitations established by the Board. The monitoring shall occur through a review of the reports submitted by the BAO in accordance with the Board Appointed Officer Performance Evaluation procedure."

The District Counsel explained that the policy and the District Counsel's employment agreement would require an amendment to include implementation of a multi-source assessment and could be done provided these amendments occur in the future. The Auditor's analysis determined that the Board policy and employment agreement were designed for individual employee performance evaluation and did not prohibit the District Counsel's Office from implementing best management practices that monitor operational performance.

## **Other Issues: Realigning the Risk Management Unit Needs Further Study**

A clearly defined organizational structure, including well developed roles and responsibilities influence accountability, transparency, fairness, and responsibility. The results of our peer agency review showed that the risk management function was placed under administrative departments - variously reporting to the Deputy General Manager, the Directors of Finance, Human Resources, or Administrative Services, but ultimately reporting to the organization's CEO.<sup>28</sup>

In contrast, Valley Water's Risk Management Unit is placed under the Office of the District Counsel, reporting directly to the District Counsel who reports to the Board as previously discussed in this report. Valley Water's Risk Management Unit includes the Workers' Compensation program and risk retention (self-insurance), and risk transfer (insurance)

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<sup>28</sup> City of San Jose, VTA, MWD, San Diego County Water Agency, EBMUD.

program.<sup>29</sup> The Auditor's analysis showed that the activities of the Workers' Compensation program, such as claims processing administration and reporting, could organizationally move to the Environmental, Health, and Safety Unit. Combining these two units would integrate and centralize business processes for the prevention of accidents and management of claims should accidents occur.<sup>30</sup> The analysis also showed that the CEO does not have a formal role in establishing the Risk Management Unit's goals and objectives or in the monitoring of its performance.

The Valley Water Risk Manager explained that the risk management function is structured under the District Counsel's Office to better review claims and contracts, provide easier access for legal coordination, and that the Workers' Compensation program should remain under his unit because of shared expertise among staff. In contrast, the Procurement and Contracts Manager reported that better efficiencies could be accomplished through consolidation with their office because separating the insurance coverage function has led to confusion and frustration among vendors. Further study would be needed on organizational restructuring given that standard business practices show that executive management, such as the CEO, should be responsible and held accountable for risk management and control processes.

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<sup>29</sup> The mission of the Risk Management Program Unit is to protect assets by identifying and evaluating loss exposures and applying effective risk management techniques to reduce or eliminate risk. Specifically, the unit is tasked with the management of Valley Water's Workers' Compensation program and risk retention (self-insurance) and risk transfer (insurance) programs to cost-effectively maximize coverage and to comply with the Board Governance policies. The Risk Management Unit, currently staffed by a Risk Manager and Management Analyst II, and a Program Administrator of the Workers' Compensation program, was transitioned to the District Counsel's Office in 2007 from the Chief Administrative Office (now the Information Technology & Administrative Services Office). Between July 2017 and March 2020, Risk Management processed approximately 208 settlements totaling approximately \$828K.

<sup>30</sup> The program is housed under the Risk Management Unit as a separate function staffed by one Program Administrator.



# **Section 4: Acknowledgments**

# **ACKNOWLEDGMENTS**

TAP International wishes to thank the staff who participated in this audit from the following divisions and units:

- Office of the District Counsel and Risk Management
- Clerk of the Board
- Office of Talent and Inclusion
- Dam Safety and Capital Delivery
- Watersheds Design and Construction
- Watersheds Stewardship and Planning
- Water Utility Capital
- Raw Water
- Water Supply
- Treated Water
- Information Technology and Administrative Services
- General Services
- The Board of Directors





# Section 5: Appendices





# APPENDIX A – Summary of Agency Responses

**RECOMMENDATION #1** - The District Counsel's Office should develop and implement a written strategy for approval by the Board that provides an updated operating model for efficient service delivery. In the development of the strategy, the District Counsel can consider, for example, enhanced policy and procedure development and new/enhanced tools described throughout this report. These tools, for example, can include workflow management, SLAs, added performance measurement, use of multi-source feedback assessments, and risk-based criteria assessments.

**SUMMARY OF MANAGEMENT RESPONSE:**  
**Management agrees with the recommendation.**

The District Counsel agrees to develop and implement a written strategy with an updated operating model for efficient service delivery for approval by the Board.

The District Counsel further commented on the many suggested solutions included in the audit report, describing the varied potential benefits or concerns.

**Target Implementation:** The District Counsel recommends that implementation should await appointment of a successor District Counsel so that he or she can have critical input on the ultimate strategy proposed for the office. With respect to implementation of a future written strategy, it is suggested that the Board consider this as a goal for the successor District Counsel. Direction is requested from the Board of Directors if it would like the strategy to be developed prior to the appointment of a successor District Counsel.

**INDEPENDENT AUDITOR RESPONSE**

TAP International agrees that the development and implementation of the updated operating strategy should await appointment of a successor District Counsel because of the need for organizational and operational changes to address the issues described in the audit report.

Although TAP International did not formally recommend implementation of the multiple potential solutions described in the audit report, the solutions suggested are standard management practices to address the District Counsel's Office's service delivery issues that were identified by the audit (such as timeliness, communication, and non-uniform approaches to providing services). TAP International opted against prescribing the use of these tools to provide management flexibility to tailor or adopt alternative solutions as part of an updated operating model. The current District Counsel in describing concerns with a suggested solution contained in the audit report, such as the development of criteria for risk management unit decision-making, dedicating staff to serve the Board only, and tracking attorney time, has the flexibility to implement other alternative strategies that could enhance Office performance and accountability.

<p><b>RECOMMENDATION #2</b> - The District Counsel and the Information Technology &amp; Administrative Services Chief Operating Officer should update Valley Water Administrative Policies that (1) identify areas that require the development of new contractual and agreement templates, and (2) identify the responsible party for updating existing contract, agreement, and amendment templates as well as non-disclosure agreements (NDAs). These updates should also include the responsible party for NDA monitoring.</p>	
<p><b>SUMMARY OF MANAGEMENT RESPONSE:</b>  <b>Management agrees with the recommendation.</b></p> <p>The District Counsel reported that efforts to develop an administrative policy to address non-disclosure agreement are underway with an expected completion date of April 2021 or earlier.</p> <p><b>Target Implementation:</b> July 1, 2021.</p>	<p><b>INDEPENDENT AUDITOR RESPONSE:</b></p> <p>TAP International commends District Counsel initiation of activities to address this recommendation.</p>

<p><b>RECOMMENDATION #3</b> - The District Counsel should convene a workgroup on planning activities or projects involving contracting opportunities with key stakeholders (E.g., Chief Executive Officer (CEO) and Chief Operating Officers (COOs)) to develop a decision-making guide for early engagement with the District Counsel Office and Risk Management.</p>	
<p><b>SUMMARY OF MANAGEMENT RESPONSE:</b>  <b>Management agrees with the recommendation.</b></p> <p>District Counsel agrees that early involvement by the District Counsel’s Office and Risk Management on complex, high-value, or large-scale Valley Water projects that will involve contracts would generally be beneficial. While there have been recent efforts to include the District Counsel’s Office in the early planning processes for some projects (e.g., the Anderson Dam Retrofit Project), more consistency would be beneficial. This consistency can be increased through the development of the recommended decision-making guide and its use by the CEO and Chief Operating Officers since they are the ones who will be aware of future projects and project needs. The District Counsel is happy to attempt to convene the recommended workgroup and hopes the other BAOs and Valley Water’s Chief Operating Officers and Chief Financial Officer will support and participate in the workgroup.</p> <p><b>Target Implementation:</b> May 1, 2021. Unless different direction is received from the Board of Directors, the District Counsel does not believe that implementation of this recommendation needs to wait upon the appointment of a successor District Counsel.</p>	<p><b>INDEPENDENT AUDITOR RESPONSE:</b></p> <p>TAP International commends District Counsel initiation of activities to address this recommendation.</p>

<p><b>RECOMMENDATION #4</b> - The District Counsel should discuss with the Board the use of a master services agreement to add another procurement mechanism for legal services.</p>	
<p><b>SUMMARY OF MANAGEMENT RESPONSE: Management agrees with the recommendation</b></p> <p>The District Counsel requested that in the event the Board determines that a master services agreement should be used to procure legal services in the future, it should continue to be allowed to retain legal services separately from master services agreements in cases where there is a need for legal services that cannot be fulfilled, or cannot be best fulfilled, by firms on the list of pre-vetted firms, or there is insufficient time to use a competitive process to secure a new firm.</p> <p><b>Target Implementation:</b> To be determined.</p>	<p><b>INDEPENDENT AUDITOR RESPONSE:</b></p> <p>TAP International commends the District Counsel for initiating discussions with the Board about the use of alternative contracting mechanisms. The District Counsel noted concerns about retaining its authority to sole source legal services, but the purpose of the recommendation is to add to the procurement strategies versus eliminating them.</p>

<p><b>RECOMMENDATION #5</b> - The Board Audit Committee should ensure that the scope of the audit currently proposed in the annual audit work plan for the risk management function, include an evaluation of the advantages and disadvantages of implementing alternative organizational alignments for the Risk Management Unit and the Workers' Compensation programs.</p>	
<p><b>SUMMARY OF MANAGEMENT RESPONSE:</b></p> <p><b>Not applicable for a management response.</b></p> <p>The District Counsel commented on this recommendation and argued against organizational changes describing that Workers' Compensation activities should not be consolidated under Environmental, Health and Safety because claims administration of the Workers' Compensation program is more closely aligned with Risk Management.</p>	<p><b>INDEPENDENT AUDITOR RESPONSE:</b></p> <p>This recommendation was made to the Board Audit Committee. The audit report describes the issues that were raised that support further study of a potential organizational change. Should the Audit Committee wish to expand the scope of the current risk management audit listed on the annual work, the arguments presented by the District Counsel will be considered.</p>

# **APPENDIX B – Full Agency Response to Recommendations**

TO: Tap International, Inc.

FROM: Stanly Yamamoto

SUBJECT: District Counsel Audit Response

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## District Counsel Audit Response

The following represents the District Counsel's response to the five recommendations in the TAP International (TAP) draft audit report: District Counsel's Office Can Benefit From Enhanced Structure And Improved Management Processes. A justification is presented with any response where the District Counsel is not in agreement. Because the current District Counsel, Stanly Yamamoto, has announced his retirement effective May 3, 2021, no targeted implementation date is included for some of the recommendations. Direction is needed from Valley Water's Board of Directors regarding whether implementation should be targeted prior to May 2021 or whether it should await appointment of a successor District Counsel. Where that direction is needed, the targeted implementation dates below have been designated as "To be determined." The Board may also consider utilizing the audit as a tool for evaluating candidates and subsequently collaborating with the successor District Counsel in any implementation program.

Finally, it should be noted that where implementation of a recommendation will involve creation or modification of Board Governance Policies, Administrative Policies, or Work Instructions, final approval of the same does not rest with the District Counsel.

## Recommendations

1. The District Counsel should develop and implement a written strategy for approval by the Board that provides an updated operating model for efficient service delivery. In the development of the strategy, the District Counsel can consider, for example, enhanced policy and procedure development<sup>1</sup> and new/enhanced tools described throughout this report. These tools, for example, can include workflow management, SLAs, added performance measurement, use of 360-degree type of reviews, and risk-based criteria assessments.

**District Counsel Response: The District Counsel agrees with the overall recommendation to develop and implement a written strategy with an updated operating model for efficient service delivery for approval by the Board but disagrees (in whole or in part) with some of the identified elements suggested for inclusion in such a strategy where noted below.**

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<sup>1</sup> -Development of risk-based criteria for reviewing consultant agreements, purchase acquisitions, and/or other types of contracts.

-Development of criteria for prioritization and assignment of Board and Valley Water requests for services.

-Preparation (sources of information to be used) and maintenance of the Quarterly Report provided to the Board and the Litigation Matrix used to document current litigation status, which is part of the Quarterly Report.

-Clarification of EL 7.5 regarding the handling of Board member requests for the drafting of resolutions.

-Maintenance of the Legal Advice Matrix used to document the communication of advice provided to Valley Water management and staff.

-Personnel training requirements, including cross-training and succession planning

-E-discovery procedures (currently in development).

-Criteria for risk management decision-making applicable to insurance.



First, with respect to the targeted implementation date, the District Counsel recommends that this should await appointment of a successor District Counsel so that he or she can have critical input on the ultimate strategy proposed for the office. With respect to implementation of a future written strategy, it is suggested that the Board consider this as a goal for the successor District Counsel. Direction is requested from the Board of Directors if it would like the strategy to be developed prior to the appointment of a successor District Counsel.

a. Enhanced Policy and Procedure Development

- i. Development of risk-based criteria for reviewing consultant agreements, purchase acquisitions, and/or other types of contracts

While Risk Management agrees that some form of documentation would be helpful to create transparency as to the rationale behind the assignment of insurance requirements, that documentation must be based solely on risk factors, such as liability to Valley Water, and whether the contractor will have access to the Water's computer infrastructure.

The point of the risk management process is to assess the risk and assign insurance requirements appropriate to the risk, not based on arbitrary factors such as the size of the contract or other non-risk related factors. Size of contract and risk are not necessarily related. For example, an architect may redesign a home including placing a huge 18-foot-long I-bar between the first and second floors to ensure the second floor was supported. The cost of the architect's services is approximately \$10,000. Using the size of the contract as a determining factor, the amount of insurance required from the architect would be minimal. However, using a risk-based approach would dictate higher limits. In this case, if her design was wrong and if the I-bar had collapsed the damages could be catastrophic.

Other factors, such as whether the contract is essential, available alternatives, etc. are more business decision factors, and should be considered if the contractor takes exception to the insurance or other standard requirements. These factors can be used to evaluate whether a contractor can be relieved of the established requirements if requested.

- ii. *Development of Criteria for Prioritization and assignment of Board and Valley Water requests for service*

The District Counsel agrees that the development of such formal written criteria would be useful. Input regarding what criteria should be used can also be solicited from the successor District Counsel and from the Board at a future workshop.

- iii. *Clarification of EL 7.5 regarding the handling of Board member requests for the drafting of resolutions*

Direction will be needed from the Board regarding what, if any changes, are needed to the Governance Policies. EL-7.5 requires Board Appointed Officers (BAOs) to deal with the Board as a whole except when (a) fulfilling informal or oral individual requests for information or (b) responding to officers or committees duly charged by the Board. Drafting a resolution would not be a mere request for information. If the resolution was not requested by "officers or committees duly charged by the Board," it would fall outside of the authority of the existing EL-7.5. Further, Board Linkage 2.2 provides that "[a]ny Board member requests that require substantive work should come to the Board for direction."

To the extent that the requested resolution required substantive work by District Counsel staff, to do this work would require approval of the whole Board under the current policy. Input on

how these policies should be changed can be obtained from the entire Board at a future Board meeting or Board workshop. The Board can give direction on whether this should precede appointment of a successor District Counsel or if it should wait until after the appointment of the same. It is recommended, however, that this wait until after the appointment of a successor District Counsel so that he or she can provide input on the potential policy changes to the Board.

- iv. *Maintenance of the Legal Advice Matrix used to document the communication of advice provided to Valley Water management and staff.*

District Counsel agrees that a formal policy regarding maintenance of the Legal Advice Matrix can be developed. It is recommended that this await appointment of a successor District Counsel. The Board should also consider using this recommendation as a tool for evaluating candidates for the District Counsel position (e.g., as the foundation for an interview question).

- v. *Personnel training requirements, including cross-training and succession planning.*

District Counsel agrees that a formal policy regarding personnel training requirements can be developed, however it should be noted that staff work plans often include cross-training requirements such as the Administrative Assistant with the Executive Assistant and those efforts are consistently ongoing. It is recommended that the formal policy await appointment of a successor District Counsel. The Board should also consider using this recommendation as a tool for evaluating candidates for the District Counsel position (e.g., as the foundation for an interview question).

- vi. *E-discovery procedures.*

As noted in the audit report, these procedures are currently in development.

- vii. *Criteria for risk management decision-making applicable to insurance.*

Please see the response to section (i.) above.

b. Effective Workflow Management

District Counsel agrees that the use of a comprehensive electronic workflow application could be beneficial with respect to improving efficiency, and the future strategy to be presented to the Board may include this as a component. It is recommended that the final selection of such a program await appointment of the new District Counsel. However, earlier inquiries can be made regarding the types of programs on the market, their features, and their compatibility with Valley Water's current systems. Gathering this preliminary information may help facilitate development of the future strategy. The Board should also consider using this recommendation as a tool for evaluating candidates for the District Counsel position (e.g., as the foundation for an interview question).

Within the discussion on workflow management, the auditor sets forth an organizational option where one or two specific attorneys would be dedicated to servicing Board requests and attending standing committee meetings while other attorneys would be dedicated to servicing specific divisions and units. District Counsel does not recommend such an option for inclusion in the future strategy given the sheer number of committee meetings at Valley Water and, more importantly, the working knowledge of the underlying projects needed to be able to respond to many inquiries, often in real time. Often the attorneys working with staff on projects are in the best position to be able to answer detailed questions from the Board members. If the responsibility for Board inquiries was delegated to a single attorney, in order to answer many questions, he or she would likely need to make inquiries of the attorneys working with staff in any event, which would delay the response time and would still leave the responding attorney with less information than the appropriate responding attorney.

Dedicating one or two attorneys to servicing Board requests and attending committee meetings would also result in fewer attorneys being primarily responsible for the day-to-day work with staff. This may also result in the most experienced attorney in a subject area being unable to handle an assignment due to his or her dedication to Board requests and Committee meetings. Given the current size of the District Counsel's Office, this approach could prove to be problematic.

c. Service Level Agreements

District Counsel agrees that Service Level Agreements (SLAs) can be developed for use with some units and projects *where appropriate*. The development of the SLA program would be in conjunction with development of the overall strategy for efficient service delivery to be submitted for Board approval. This strategy would include under what circumstances SLAs should be utilized, the process under which they are entered into, and what their standard terms should include. Rather than a formal contract to be signed by two parties, the SLAs would be set out as documents setting forth formal expectations and assurances in order to increase common understanding by District Counsel staff and their respective clients. The Board may also wish to use this recommendation as a tool for evaluating candidates for the District Counsel position (e.g., as the foundation for an interview question).

In the audit report's description of a potential SLA for contract reviews, it is noted that the SLA would address agreed-upon completion dates. District Counsel notes that any meaningful estimate for the time to complete a legal review assignment would not be feasible without a review and thorough understanding of the assignment and all of its inherent elements. Accordingly, rather than arbitrarily identifying a specific timeline for completion of legal review assignments, most SLAs would likely need to allow some flexibility and perhaps include a process by which the assigned attorney would review and understand the assignment and issues presented before providing an estimated completion date for an assignment. This is the type of process that would be further defined in the future strategy for efficient service delivery to be developed and submitted for Board approval.

Finally, since the SLAs would be a component of the strategy for efficient service delivery, District Counsel recommends that targeted implementation follow appointment of a successor District Counsel. Prior to that time, District Counsel can implement standard communication protocols to be used by legal counsel to keep clients apprised of the status of outstanding legal assignments.

Note: Board Audit Committee members requested that TAP provide information as which public entities have currently implemented and are administering SLAs.

d. Better Timekeeping System

District Counsel acknowledges that where there is an opportunity for Valley Water to recover funds for the time legal counsel works on matters, their time should be accurately tracked and recorded.

For matters *not* involving a potential recovery of costs/fees, District Counsel is open to evaluating the potential use of timekeeping in the context of a future electronic workflow application. The actual features and functions of any electronic workflow application ultimately selected will determine what types of activities can be tracked and how efficiently they can be tracked. Defining these factors will allow the successor District Counsel to make a fully informed recommendation regarding what, if any, attorney activities should be regularly tracked by time, how such time tracking should be documented, and how the results should be utilized. The Board may also wish to use this recommendation as a tool for evaluating candidates for the District Counsel position (e.g., as the foundation for an interview question).

Any inclusion of timekeeping in the future strategy would need to be tailored to serve an objective purpose and need (for example, an identified need to capture time spent on specific projects or types

of assignments). In addition, whether or how to use such timekeeping would consider the time needed to capture such records weighed against the perceived benefit of obtaining the time records. For example, if attorneys (such as those in private practice) had to track time for *each and every* task performed over the course of a day (answering phone calls, reading emails, writing emails, answering short questions, attending meetings, etc.), even with the use of software an undue amount of time would be consumed in this exercise every week (easily more than one hour each work day), which would have the cumulative impact of leaving significantly less time to perform actual legal work each week. While the intended outcome of the audit is to increase efficiency, tracking time for *all* daily activities would have the opposite effect of creating inefficiency given the reduced amount of time available to perform legal work.

In addition, depending upon their required level of detail, the timekeeping records could be strictly confidential attorney-client communications and available for review by the District Counsel alone. A modified version might be made available for external revenue-generating purposes.

The audit report suggests that the use of comprehensive time tracking could potentially identify other reimbursement opportunities as well as provide the ability to effectively assign attorney workloads and right-size staffing levels. While it is true that where there is an actual opportunity for reimbursement, the time records must have been captured in order to submit the reimbursement request or motion for fees, the reality is that these reimbursement opportunities are extremely rare in practice. For purposes of reimbursement, the more efficient practice would be to identify those reimbursement opportunities at the outset and perform more robust timekeeping in only those cases. The future strategy for enhanced service delivery will need to determine what, if any, time records would be useful to evaluate attorney workloads and staffing levels. That defined need should determine the scope of any timekeeping.

NOTE: The Board Audit Committee members requested information from TAP as to which public agencies are currently using timekeeping systems. District Counsel requests that TAP's response clarify the purposes for such timekeeping by those agencies. For example, is it only done for revenue-generating or recovery purposes?

e. Use of Added Performance Measures

District Counsel is not opposed to identifying and utilizing additional performance measures in conjunction with an electronic workflow application. The features and functions of that workflow software may determine what additional performance measures make sense for inclusion in a future strategy for enhanced service delivery. However, it is recommended that the development and use of new performance measures await appointment of the successor District Counsel.

f. Use of a 360-Degree Type of Review

District Counsel is not opposed to the use of regular (annual) feedback from clients as a tool to better monitor operational performance of the office as a whole and to identify any problems or concerns facing the office. This feedback would not be utilized for individual personnel evaluations but would instead be used as a tool by the District Counsel to assess overall office performance. The future strategy for enhanced service delivery would need to define the scope and features of this program. It is recommended that the development and use of this review await appointment of a successor District Counsel.

NOTE: The Board Audit Committee members requested that TAP provide additional information defining this terminology (360-degree review) as it is a term of art and advise as to which other public agency in-house legal offices are using such reviews.

**Targeted Implementation of Recommendation 1: To be determined.**

2. The District Counsel and the Information Technology & Administrative Services Chief Operating Officer should update Valley Water Administrative Policies that (1) identify areas that require the development of new contractual and agreement templates, and (2) identify the responsible party for updating existing contract, agreement, and amendment templates as well as non-disclosure agreements (NDAs). These updates should also include the responsible party for NDA monitoring.

**District Counsel Response: The District Counsel agrees with this recommendation.**

The recommendation is to work with the Information Technology & Administrative Services Chief Operating Officer to update Valley Water *administrative policies* relating to contract templates and responsible parties in the contracting process. These would be the administrative policies for which this Chief or her reports are the designated 'owners.'

As to the first part of the recommendation (updating an administrative policy that identifies *areas* that require the development of new contractual and agreement templates), the District Counsel presumes that the intent is for the development of an administrative policy which lays out a clear *process* for regularly identifying any needed contract templates or template updates.

As to the development of an administrative policy regarding NDAs, the District Counsel notes that this effort has already commenced and should be completed by April 2021 or earlier. The Board Audit Committee has requested an opportunity to review the proposed administrative policy and provide any feedback. A proposed policy will be scheduled for a future Board Audit Committee agenda, and any input from the Committee will be considered before the policy is formally adopted.

**Targeted Implementation of Recommendation 2: July 1, 2021.**

3. The District Counsel should convene a workgroup on planning activities or projects involving contracting opportunities with key stakeholders (E.g., Chief Executive Officer (CEO) and Chief Operating Officers (COOs)) to develop a decision-making guide for early engagement with the District Counsel Office and Risk Management.

**District Counsel Response: The District Counsel agrees with this recommendation.**

District Counsel agrees that early involvement by the District Counsel's Office and Risk Management on complex, high-value, or large-scale Valley Water projects that will involve contracts would generally be beneficial. While there have been recent efforts to include the District Counsel's Office in the early planning processes for some projects (e.g., the Anderson Dam Retrofit Project), more consistency would be beneficial. This consistency can be increased through the development of the recommended decision-making guide and its use by the CEO and Chief Operating Officers since they are the ones who will be aware of future projects and project needs. The District Counsel is happy to attempt to convene the recommended workgroup and hopes the other BAOs and Valley Water's Chief Operating Officers and Chief Financial Officer will support and participate in the workgroup.

Unless different direction is received from the Board of Directors, the District Counsel does not believe that implementation of this recommendation needs to wait upon the appointment of a successor District Counsel.

**Targeted Implementation for Recommendation 3: May 1, 2021.**



4. The District Counsel should discuss with the Board the use of a master services agreement to add another procurement mechanism for legal services.

**District Counsel Response: The District Counsel has no objection to this recommendation.**

The recommendation is for the District Counsel to *discuss* with the Board the use of a master services agreement to add another procurement mechanism for legal services. District Counsel has no objection to obtaining the Board's views on this issue through such a discussion. The Board may also consider using this recommendation as a tool for evaluating candidates for the District Counsel position (e.g., as an interview question).

Currently, the District Counsel's Office does not typically use a competitive procurement process to retain outside legal counsel, and such counsel are selected based upon a number of considerations including experience and expertise. A competitive process has been used to select counsel in the past for certain projects or ongoing programs. For example, the District Counsel used a competitive process to select law firms to provide legal services for workers' compensation litigation and for recycled water infrastructure procurement (i.e., design-build and P3).

The Board's own Governance Policy (EL-5.3.9) exempts payments for legal services from the competitive procurement process. In order to ensure flexibility and the ability to timely retain the best counsel for any given need, District Counsel recommends that the Board maintain the current Governance Policy provision to be utilized with formal written standards for the selection of outside counsel to be developed by the District Counsel and maintained with the office's formal policies.

In the event that the Board determines that a master services agreement should be used to procure legal services in the future, District Counsel recommends that it be allowed to retain legal services separately from master services agreements in cases where there is a need for legal services that cannot be fulfilled, or cannot be best fulfilled, by firms on the list of pre-vetted firms, or there is insufficient time to use a competitive process to secure a new firm.

The need for some types of legal services and expertise is foreseeable and can be incorporated in a request for qualifications. However, it is impossible to anticipate all such future needs and some needs will only be occasional and periodic, such as unique investigations requiring specific expertise. For example, there may be a need for legal counsel with a particular expertise in an esoteric area of law or hired for a particular strategic reason due to a pending, unanticipated political matter. Further, it is possible that pre-vetted firms may no longer be suitable for a particular assignment due to lack of availability, recent public controversy, retirement or loss of attorneys in the desired practice areas, etc. Where this occurs, there may be a need to fill a legal need on short notice. Having to go through a formal procurement process may prevent the District Counsel's office from retaining new counsel in time to address a given need. Consequently, any such program (and modification of the related Governance Policies) should retain an exception as described above.

Note: The Board Audit Committee members requested TAP provide information as to how other local agencies are currently procuring outside counsel services; if Master Service Agreements have been implemented; and for what types of services.

**Targeted Implementation for Recommendation 4: To be determined.**

5. The Board Audit Committee should ensure that the scope of the audit currently proposed in the annual audit work plan for the risk management function, include an evaluation of the advantages and disadvantages of implementing alternative organizational alignments for the Risk Management Unit and the Workers' Compensation programs.

**District Counsel Response: The District Counsel disagrees with this recommendation.**

When determining the scope of the future audit for the risk management function, Management requests that the Board Audit Committee consider the following:

Risk Management takes exception to the recommendation that Workers Compensation (“WC”) should be moved from Risk Management to the Environmental Health and Safety Unit (“EHS”). This recommendation appears to be based on a fundamental misconception as to the primary function of the Workers’ Compensation unit. The report states that moving Workers’ Compensation to EHS will “place the Workers’ Compensation program in a unit most closely aligned with their function and allow for a more streamlined reporting and performance feedback structure, rather than reporting to a business unit that reports directly to the Board,” yet the function of WC is never discussed.

The essential function of the WC unit is claims administration. The WC unit intakes employee claims of injury, reports them to the third-party administrator, assists the injured worker throughout the lifetime of the claim, and generally manages the workers’ claim from beginning to end. The Workers Compensation Administrator is responsible for interacting with, and managing, the Third-Party Claims administrator, again, a claims function, as well as dealing with state claim agencies, etc. Investigation into the cause of the accident is not an essential function of the unit. The investigation into the cause of the injury is necessarily handled by the EHS unit. While the Workers Compensation Administrator assists in the investigation and uses the information for the claims, this investigation is a separate function from WC.

The essential function of the WC unit is closely aligned with that of the Risk Management Unit. One of the essential functions of the Risk Management Unit is also claims. In this particular organization, the Risk Manager has more than 20 years’ experience overseeing WC claims. EHS does not handle claims.

The District Counsel reserves the right to make further comments on this issue if and when it is included in a future audit of the risk management function.

**Targeted Implementation for Recommendation 5: N/A.**

/s/ Electronically Approved  
Stanly Yamamoto  
District Counsel

cc: Darin Taylor