

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

806



FROM: Executive Office

SUBMITTAL DATE:
January 22, 2010

SUBJECT: Legal Services Agreement with Burhenn & Gest LLP

RECOMMENDED MOTION: That the Board of Supervisors:

1. Authorize the attached Legal Services Agreement between the County and Burhenn & Gest LLP, for specialized legal consultation related to the County's NPDES Program; and
2. Authorize the Chairperson to execute five (five) copies of the agreement; and
3. Direct the Clerk of the Board to return three (3) copies of the Agreement to the Executive Office for transmittal.

BACKGROUND: The County's NPDES Program is in need of additional technical expertise to evaluate an administrative enforcement action from the San Diego Regional Water Quality Control Board. The Board has issued a complaint against the County and highly specialized outside counsel is necessary to assist the County in its defense.

Alex Gann

Alex Gann, Principal Management Analyst

FINANCIAL DATA	Current F.Y. Total Cost:	\$ 75,000	In Current Year Budget:	Yes
	Current F.Y. Net County Cost:	\$ 75,000	Budget Adjustment:	No
	Annual Net County Cost:	\$	For Fiscal Year:	09/10

SOURCE OF FUNDS: CEO NPDES Fund/Litigation & Legislation Fund	Positions To Be Deleted Per A-30	<input type="checkbox"/>
	Requires 4/5 Vote	<input type="checkbox"/>

C.E.O. RECOMMENDATION:

APPROVE

BY: *Gary M. Christmas*
Gary M. Christmas

County Executive Office Signature

FORM APPROVED, COUNTY COUNSEL
BY: *Pamela J. Walls* 1/28/10
DATE
PAMELA J. WALLS

Departmental Concurrence

Dept't Recomm.: Consent Policy
Per Exec. Ofc.: Consent Policy

Prev. Agn. Ref.:

District: All

Agenda Number:

ATTACHMENTS FILED
WITH THE CLERK OF THE BOARD

3.12

The County of Riverside was issued a Draft Administrative Civil Liability in May 2009 for alleged issues of non-compliance with the County's Municipal Separate Storm Sewer System (MS4) Permit. In discussing the issue with County management and County Counsel, it was determined that staff should obtain outside legal counsel with expertise in NPDES or water quality law. Given that the Regional Board had set an aggressive meeting schedule for the draft ACL, the County approached the firm of Burhenn & Gest LLP, to enter into an agreement to represent the County, due to their vast experience in the field. The firm has experience with the issues at hand and has worked for large municipalities such as Los Angeles County. In addition, Burhenn & Gest LLP, has litigated successfully on behalf of municipalities and has provided significant work on protecting the interests of local government agencies as it relates to unfunded mandates and expertise on Total Maximum Daily Load issues and their financial ramifications.

1 **LEGAL SERVICES AGREEMENT**

2
3 The COUNTY OF RIVERSIDE, hereinafter called "COUNTY", and Burhenn & Gest LLP,
4 hereinafter called "ATTORNEY" hereby agree as follows:

5 1. SCOPE OF SERVICES. ATTORNEY shall provide legal counsel and services in
6 connection with defending the County in response to an Administrative Civil Liability complaint ("ACL")
7 received by the County from the Regional Water Quality Control Board, San Diego Region. Such work
8 shall be done in accordance with the written guidelines referenced below, attached hereto and
9 incorporated by reference herein.

10 2. TERMS OF AGREEMENT. This Agreement shall commence on May 28, 2009 and
11 continue until June 30, 2011, or until the legal proceedings or negotiation in the above referenced matters
12 have been concluded, whichever occurs first.

13 3. KEY ATTORNEY. ATTORNEY agrees that David Burhenn will be the lead attorney
14 assigned to perform the work under the Scope of Services and Terms of Agreement. Any changes or
15 substitution of the assigned attorney must have the express written approval of the County Executive
16 Officer or his designee. In addition to Mr. Burhenn, Howard Gest may also provide services under this
17 Agreement.

18 4. COMPENSATION. COUNTY shall pay ATTORNEY at the following hourly rates for
19 services rendered:

20

Howard Gest	\$350.00
David Burhenn	\$350.00
Associates	\$250.00
Paralegals	\$ 95.00

21
22
23

24 The total amount of compensation paid to ATTORNEY under the terms of this Agreement shall not
25 exceed the sum of fifty thousand dollars (\$50,000), unless a hearing on the ACL is completed, in which
26 case the total amount of compensation shall not exceed seventy-five thousand dollars (\$75,000.00) unless
27 a written modification to this Agreement is executed by both parties prior to performance of any
28 additional services. Since these services are generally required throughout the term of the contract,

1 COUNTY and ATTORNEY will monitor work requirements and efforts such that the limits of
2 compensation are not reached before the last month of the term of the Agreement.

3 5. UNAVAILABILITY OF FUNDS IN SUCCEEDING FISCAL YEARS. When funds are
4 not appropriated or otherwise made available in a subsequent Fiscal Year, this Agreement shall be
5 cancelled and ATTORNEY shall be reimbursed for the reasonable value of any non-recurring costs
6 incurred and covered under the terms of this Agreement.

7 6. EXPENSES. Reimbursable expenses shall include billings for costs and expenses incurred
8 on COUNTY's behalf, including: attorney service courier, photocopies of documents, filing fees, and
9 travel. There are no other reimbursable expenses, unless previously agreed to. No single expense- shall
10 exceed \$500.00 without the prior consent of the County Executive Officer or his designee.

11 7. PAYMENT. ATTORNEY shall submit its billing statement at least quarterly, but no more
12 than monthly, in arrears. (This requirement shall not apply to invoices not submitted prior to the execution
13 of this Agreement.) Original statements/invoices shall be submitted by mail or hand delivered directly to
14 Alex Gann, Deputy County Executive Officer, at 4080 Lemon Street, Fourth Floor, Riverside, CA
15 92501, and shall be itemized to include (i) staffing levels, hourly rates and specific activities for each
16 attorney and/or paralegal; (ii) listing of each activity as a line item in a time reporting format acceptable to
17 COUNTY with a detailed description of specific activities for each attorney and/or paralegal; (iii) total
18 current period fees and total cumulative fees billed for each staffing level; and (iv) current period expenses
19 and total cumulative expenses billed in itemized categories.

20 It is the expectation of COUNTY that it will not be billed for ordinary overhead expenses,
21 including but not limited to: ordinary word processing, copying, calendaring or other support staff work,
22 time to prepare and review billings, Westlaw/LEXIS and local travel.

23 ATTORNEY shall have and maintain all backup documentation to support all entries
24 included in the monthly billing statement. Such documentation shall be in a form subject to audit and in
25 accordance with generally accepted accounting principles. ATTORNEY shall make such documentation
26 available to auditors upon request and at such reasonable times and locations as may be agreed to between
27 COUNTY and ATTORNEY.

1 Payments shall be made by COUNTY within thirty (30) days of receipt of billing from
2 ATTORNEY. All inquiries regarding payments and/or status of statements/invoices should be made
3 directly to Alex Gann, (951) 955-1110.

4 8. LICENSES. ATTORNEY, its employees, agents, contractors and subcontractors shall
5 maintain professional licenses required by the laws of the State of California at all times while performing
6 services under this agreement.

7 9. NOTICES. Any and all notices sent, or required to be sent, to the parties of this agreement
8 will be mailed by first class mail, postage prepaid, to the following addresses:

9 County of Riverside Executive Office
10 Attn: Alex Gann
11 Deputy County Executive Officer
12 4080 Lemon Street, 4th Floor
13 Riverside, CA 92501

14 David W. Burhenn
15 Burhenn & Gest, LLP
16 624 South Grand Avenue
17 Suite 2200
18 Los Angeles, CA 90017

19 10. REQUIRED INSURANCE. Without limiting or diminishing ATTORNEY'S obligation to
20 indemnify or hold COUNTY harmless, ATTORNEY shall procure and maintain or cause to be
21 maintained, at its sole cost and expense, the following insurance coverage during the term of this
22 Agreement:

23 a. Workers' Compensation:

24 If ATTORNEY has employees as defined by the State of California, ATTORNEY shall
25 maintain statutory Workers' Compensation Insurance (Coverage A) as prescribed by the laws of the State
26 of California. Policy shall include Employer's Liability (Coverage B) including Occupational Disease with
27 limits not less than \$1,000,000.00 per person per accident. Policy shall be endorsed to waive subrogation
28 in favor of COUNTY and, if applicable, to provide a Borrowed Servant/Alternate Employer endorsement.

29 b. Vehicle Liability:

30 If vehicles or mobile equipment are used in the performance of the obligations under this
31 Agreement, ATTORNEY shall maintain liability insurance for all owned, non-owned or hired vehicles so
32 used in an amount not less than \$1,000,000.00 per occurrence combined single limit. If such insurance
33 contains a general aggregate limit, it shall apply separately to this Agreement or be no less than two (2)
34 times the occurrence limit. Policy shall name the County of Riverside, its Agencies, Districts, Special

1 Districts and Departments, their respective directors, officers, Board of Supervisors, employees, elected or
2 appointed officials, agents or representatives as Additional Insured's.

3 c. Professional Liability:

4 ATTORNEY shall maintain Professional Liability Insurance providing coverage for
5 ATTORNEY'S performance of work included within this Agreement, with a limit of liability of not less
6 than \$1,000,000.00 per occurrence and \$2,000,000.00 annual aggregate. If ATTORNEY's Professional
7 Liability Insurance is written on a claims made basis rather than an occurrence basis, such insurance shall
8 continue through the term of this Agreement and ATTORNEY shall purchase at his sole expense either 1)
9 an Extended Reporting Endorsement (also known as Tail Coverage); or 2) Prior Dates Coverage from a
10 new insurer with a date retroactive to the date of, or prior to, the inception of this Agreement; or 3)
11 demonstrate through Certificates of Insurance that ATTORNEY has maintained continuous coverage with
12 the same or original insurer. Coverage provided under items 1), 2) or 3) will continue for a period of five
13 (5) years beyond the termination of this Agreement.

14 d. General Insurance Provisions – All Lines:

15 1) Any insurance carrier providing insurance coverage hereunder shall be
16 admitted to the State of California and have an A.M. BEST rating of not less than an A:VIII (A:8) unless
17 such requirements are waived, in writing, by the County Risk Manager. If the County's Risk Manager
18 waives a requirement for a particular insurer such waiver is only valid for the specific insurer and only for
19 one policy term.

20 2) ATTORNEY's insurance carrier(s) must declare its insurance self-insured
21 retentions. If such self-insured retentions exceed \$500,000.00 per occurrence such retentions shall have
22 the prior written consent of the County Risk Manager before the commencement of operations under this
23 Agreement. Upon notification of self-insured retentions which are deemed unacceptable to the COUNTY,
24 at the election of the County's Risk Manager, ATTORNEY's carriers shall either (1) reduce or eliminate
25 such self-insured retentions with respect to this Agreement with COUNTY or (2) procure a bond which
26 guarantees payment of losses and related investigations, claims administration, defense costs and
27 expenses.

1 3) ATTORNEY shall cause their insurance carrier(s) to furnish COUNTY with
2 1) a properly executed original certificate(s) of insurance and original certified copies of endorsements
3 effecting coverage as required herein and, 2) if requested to do so orally or in writing by the County Risk
4 Manager, provide original certified copies of policies including all Endorsements and all attachments
5 thereto, showing such insurance is in full force and effect. Further, said Certificate(s) and policies of
6 insurance shall contain the covenant of the insurance carrier(s) that thirty (30) days written notice be given
7 to COUNTY prior to any material modification, cancellation, expiration, or reduction in coverage of such
8 insurance. In the event of a material modification, cancellation, expiration, or reduction in coverage, this
9 Agreement shall terminate forthwith, unless COUNTY receives, prior to such effective date, another
10 properly executed original Certificate of Insurance and original copies of endorsements or certified
11 original policies, including all endorsements and attachments thereto, evidencing coverage set forth herein
12 and the insurance required herein is in full force and effect. Individual(s) authorized by the insurance
13 carrier to do so on its behalf shall sign the original endorsements for each policy and the Certificate of
14 Insurance.

15 ATTORNEY shall provide COUNTY promptly following execution of this Agreement with
16 original Certificate(s) of Insurance and certified original copies of endorsements and, if requested,
17 certified original policies of insurance including all endorsements and any and all other attachments as
18 required in this Section.

19 4) It is understood and agreed by the parties hereto that ATTORNEY's
20 insurance shall be construed as primary insurance and COUNTY's insurance and/or deductibles and/or
21 self-insured retentions or self-insured programs shall not be construed as contributory.

22 5) If during the term of this Agreement or any extension thereof, there is a
23 material change in the scope of services; or, there is a material change in the equipment to be used in the
24 performance of the scope of work which will add additional exposures (such as the use of aircraft,
25 watercraft, cranes, etc.); or, the term of this Agreement, including any extensions thereof, exceeds five (5)
26 years, the County reserves the right to adjust the types of insurance required under this Agreement and the
27 monetary limits of liability for the insurance coverage currently required herein, if in the County Risk
28

1 Manager's reasonable judgment the amount or type of insurance carried by the ATTORNEY has become
2 inadequate.

3 6) The insurance requirements contained in this Agreement may be met with a
4 program(s) of self-insurance acceptable to the County.

5 7) The ATTORNEY shall pass down the insurance obligations contained
6 herein to all tiers of subcontractors working under this Agreement.

7 11. INDEMNITY AND HOLD HARMLESS. ATTORNEY shall indemnify and hold
8 harmless the County of Riverside, its Agencies, Districts, Special Districts and Departments, their
9 respective directors, officers, Board of Supervisors, elected and appointed officials, employees, agents and
10 representatives (the "Indemnified Parties") from any liability whatsoever, including but not limited to,
11 property damage, bodily injury, or death, based or asserted upon any services of ATTORNEY, its officers,
12 employees, subcontractors, agents or representatives arising out of or in any way relating to this
13 Agreement and ATTORNEY shall defend at its sole expense and pay all costs and fees, including but not
14 limited to, attorney fees, cost of investigation, defense and settlements or awards, on behalf of the
15 Indemnified Parties in any claim or action based upon such liability brought by a third party.

16 With respect to any action or claim subject to indemnification herein by ATTORNEY,
17 ATTORNEY shall, at their sole cost, have the right to use counsel of their choice and shall have the right
18 to adjust, settle, or compromise any such action or claim without the prior consent of COUNTY provided,
19 however, that any such adjustment, settlement or compromise in no manner whatsoever limits or
20 circumscribes ATTORNEY's indemnification to the Indemnified Parties as set forth herein.

21 ATTORNEY's obligation hereunder shall be satisfied when ATTORNEY has provided COUNTY
22 the appropriate form of dismissal relieving COUNTY from any liability for the action or claim involved.

23 The specified insurance limits required in this Agreement shall in no way limit or circumscribe
24 ATTORNEY's obligations to indemnify and hold harmless the Indemnified Parties herein from third party
25 claims.

26 12. TERMINATION. This Agreement may be terminated by either ATTORNEY or
27 COUNTY upon a ten (10) day written notice to the other party. After receiving a termination notice,
28 ATTORNEY shall take all steps necessary to stop services on the date and to the extent specified in the

1 termination notice and submit a billing for all services performed to date of notice of termination and any
2 services to be completed as set forth in the notice of termination within thirty (30) days from effective
3 termination date. ATTORNEY shall promptly submit a brief report advising of the status of all matters,
4 including any unresolved matters being handled by ATTORNEY for COUNTY. ATTORNEY shall give
5 COUNTY copies or originals, as appropriate of all files and attorney work product for all matters on
6 which it has been working. This includes any computerized index, computer programs and document
7 retrieval system created or used for these matters.

8 13. ASSIGNMENT. Neither this Agreement nor any part thereof shall be assigned by
9 ATTORNEY without the prior written consent of COUNTY.

10 14. NONDISCRIMINATION. In the performance of the terms of this Agreement,
11 ATTORNEY shall not engage in nor permit others he may employ to engage in discrimination in the
12 employment of persons because of the race, color, national origin or ancestry, religion, physical handicap,
13 disability as defined by the Americans with Disabilities Act (ADA), medical condition, marital status or
14 sex of such persons, in accordance with the provision of California Labor Code Section 1735.

15 15. PROFESSIONAL CONFLICT OF INTEREST. ATTORNEY represents and warrants that
16 no County employee whose position in County enables him/her to influence the award of this Agreement
17 or any competing agreement, and no spouse or economic dependent of such employee is or shall be
18 employed in any capacity by ATTORNEY, or shall have any direct or indirect financial interest in this
19 Agreement.

20 Anyone who is a former employee of County at the time of execution of this Agreement or who
21 subsequently becomes affiliated with ATTORNEY in any capacity (employee, associate or partner) shall
22 not (i) participate in the services provided by ATTORNEY to County; or (ii) become a partner,
23 shareholder or otherwise share in the profits of ATTORNEY for a period of one year from the date the
24 former County employee left County employment.

25 It is possible that some of ATTORNEY's present or future clients will have disputes with County
26 during the time that ATTORNEY is representing the County. COUNTY and ATTORNEY agree that
27 should the situation arise where a new or existing client engages ATTORNEY in any matter in a position
28 adverse to COUNTY or in which COUNTY's interest may be adversely affected, that ATTORNEY will

1 so advise COUNTY, and upon receipt of such notice, COUNTY may determine that the conflict may be
2 waived or may determine that it is in COUNTY's best interest to terminate the services of ATTORNEY.
3 Should COUNTY determine that it is best to terminate the services of ATTORNEY, COUNTY will notify
4 ATTORNEY of such decision. ATTORNEY may then submit any outstanding invoices for payment up
5 to the date of termination as determined by the notice from COUNTY.

6 16. CONFIDENTIALITY. ATTORNEY shall maintain the confidentiality of all information
7 which it may acquire arising out of or connected with activities under this Agreement in accordance with
8 all applicable Federal, State and County laws, regulations, ordinances and directives relating to
9 confidentiality, including the Code of Professional Responsibility. ATTORNEY shall inform all of its
10 principals, employees and agents providing services hereunder of the confidentiality provisions of this
11 Agreement. These confidentiality obligations shall survive the termination or expiration of this
12 Agreement.

13 17. COMPLETE AGREEMENT. This Agreement shall constitute the complete and exclusive
14 statement of understanding between COUNTY and ATTORNEY which supersedes all previous written or
15 oral agreements, and all prior communications between COUNTY and ATTORNEY relating to the
16 subject matter of this Agreement.

17 ATTORNEY

18 Dated: January 28, 2010


19 By: 
20 DAVID W. BURHENN
21 BURHENN & GEST LLP

COUNTY OF RIVERSIDE

22 Dated: _____

23 By: _____
24 BILL LUNA
25 County Executive Officer

26 APPROVED AS TO FORM:

27 By: 
28 PAMELA J. WALLS
County Counsel

Dated: 1/23/10