

MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

April 30, 1993

Board of Directors

General Counsel

Legal Department Report for April 1993

This report discusses significant matters with which the Legal Department was concerned during April 1993.

A. Proceedings in Which Metropolitan Is a Party

1. Garvey Reservoir Restoration (City of Monterey Park v. MWD)

On March 30, 1993, in Los Angeles Superior Court Case No. BS 020116 (EIR adequacy case), Metropolitan filed a motion seeking a new trial on the court's March 1 holding that the final design for the Garvey Reservoir Restoration Project is required before an EIR can be prepared, and that the EIR excluded the impact of the project itself. This matter is scheduled for hearing on May 4th along with plaintiff's motion for attorney fees.

On April 16, 1993, in Los Angeles Superior Court Case No. BC 069605 (CEQA lead agency, Brown Act violations), the court denied the City of Monterey Park's motion for reconsideration of the court's March 4, 1993 ruling that the city may not proceed with its claim that the Department of Water Resources, Division of Safety of Dams, instead of Metropolitan should have prepared the EIR for the restoration project. Demurrer on first amended petition regarding asserted Brown Act violations is scheduled for hearing on May 12th.

2. Etiwanda Power Plant

Metropolitan filed with the Federal Energy Regulatory Commission an application for exemption of its Etiwanda Power Plant from the licensing requirements of the Federal Power Act. Negotiation of contracts for the sale and transmission of energy from the power plant are currently being finalized. The plant is anticipated to be operational in January 1994.

B. Proceedings of Interest to Metropolitan

1. Ward Valley Litigation May 5 Hearing

The California Court of Appeal has scheduled oral argument for May 5 in Sacramento on petitions filed last summer to stop the Department of Health Services (DHS) from proceeding with adjudicatory hearings on issuance of a license for constructing and operating the Ward Valley low-level nuclear waste disposal facility. The site is some 20 miles west of the Colorado River and would utilize some Metropolitan property pursuant to an agreement the proposed licensee (U.S. Ecology) has entered into with Metropolitan.

Metropolitan and the Los Angeles Department of Water and Power have filed friend-of-the-court briefs supporting the adjudicatory hearing process as a means of ensuring that the project would not impair Metropolitan's Colorado River supply. The Senate Rules Committee, the State Controller and the State Lands Commission, the City of Needles, Indian tribes, the Committee to Bridge the Gap and others have filed extensive briefs supporting the adjudicatory hearing for various reasons.

DHS issued a proposed license nearly two years ago, together with a final EIS/EIR, and has taken a neutral position in this case. The license applicant, The California Radioactive Materials Management Forum, the American College of Nuclear Physicians, patient groups and others filed the petitions to prevent further delay in providing a needed disposal facility.

However, even if the court grants the petitions and orders issuance of the license without an adjudicatory hearing, the fate of the project depends on transfer of the site from the federal government to the state. That issue is pending before the federal district court in San Francisco, pending the Secretary of the Interior's review of the merits of that transfer. If the court denies the petitions, the California Supreme Court and, conceivably, the United States Supreme Court could review that decision.

2. Colorado River Endangered Fish

Staff worked with members of the General Manager's staff to prepare and submit, on April 15, 1993, comments on the United States Fish and Wildlife Service's (USFWS) proposed designation of critical habitat for four endangered fish in the Colorado River. The Endangered Species Act requires the

designation of critical habitat for listed species, but also requires USFWS to consider economic and other impacts of a proposed designation and to exclude areas from the designation if the impacts outweigh the benefits of including the area within the designation. Once an area is designated as critical habitat, federal agencies are required to consult with USFWS before undertaking, funding or approving any action which would adversely modify conditions in the critical area, potentially leading to restrictions on the proposed action. Because USFWS was under a court order to propose critical habitat by January 25, 1993, it did not have time to prepare and include an economic analysis or biological support document with the proposed designation. It intends to produce those documents by July 1993, and to provide a 60-day period to receive further comments on the proposed designation. Metropolitan's comments focused on the requirement that USFWS fully and properly consider the potential water supply, power cost, and general economic impacts of the proposed designation in Metropolitan's service area; USFWS' obligation to prepare an Environmental Impact Report on the proposed designation; and the need to base its designation on adequate biological information.

3. Golden Gate Audubon Society v. Browner  
(EPA)

On April 16, 1993, a number of environmental interest groups sued the United States Environmental Protection Agency (EPA) in the United States District Court in Sacramento. The action seeks a judicial declaration that EPA's failure to adopt water quality standards for the Bay/Delta Estuary is a violation of the Clean Water Act (CWA) and a court order directing EPA to adopt such standards. Under the CWA, EPA has explicit authority to approve state-adopted water quality standards and to adopt its own water quality standards if it determines that the state standards are not sufficient. However, plaintiffs appear to be seeking freshwater outflow and other requirements that implicate water quantity and allocation, not water quality. Metropolitan consistently has contended that EPA's water quality standard authority is limited to traditional water quality concerns, and not to outflow and other requirements which attempt to regulate water quantity and allocation. This limitation is contained in Section 101(g) of the CWA (the Wallop Amendment) which states Congress' policy that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act" and that "nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been

established by any State." Staff is recommending to the Board that Metropolitan should intervene in this action to protect Metropolitan's interests.

C. Other Matters

None.



N. Gregory Taylor

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Monthly