MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

April 30, 1997

To: Board of Directors (Legal and Claims Committee--Information)

From: General Counsel

Subject: Legal Department Report for April 30, 1997

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

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

DETAILED REPORT

I. Recent Developments of Interest to Metropolitan

Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation

This action was filed April 15, 1997 seeking to lower the level of Lake Mead to 1178 feet above sea level in order to protect habitat of the endangered southwestern willow flycatcher. This could require the release of up to 3.5 million acre-feet of water from Lake Mead this year and could substantially reduce the amount of water held in the Lake for consumptive uses in the Lower Basin in future years. In a separate letter, the General Counsel is seeking Board ratification of the intervention in support of the Bureau.

Planning and Conservation League, et al. v. Department of Fish and Game, et al.

On April 10, 1997, the California Court of Appeal (Court) issued a published decision (PCL) in which it ruled that the Department of Fish and Game (Department) had erred in its long-standing interpretation that the California Endangered Species Act (CESA) permits the "take" of candidate, threatened and endangered species (protected species) incidental to otherwise lawful activities such as farming and land development. Specifically, the Court ruled that the Department had misconstrued the CESA section 2081 "management purposes" take authorization to include any incidental take in connection with disparate commercial activities, rather than just projects designed to preserve or benefit protected species.

In support of its decision, the Court cited agreed with "dicta" in San Bernardino Valley Audubon Society v. City of Moreno Valley (Moreno Valley) which stated that the section 2081 management purposes take authorization is limited to those projects which contribute to the long-term conservation, protection, restoration, and enhancement of protected species. In further support of its decision, the Court also noted that there had been proposed legislation last year that would have negated the effect of the Moreno Valley dicta but that it was not passed by the Legislature. The Court concluded that the failure to pass corrective legislation was proof that the Legislature agreed with the Moreno Valley dicta.

The Department has indicated that it will seek review of PCL by the California Supreme Court. In addition, there currently are efforts being undertaken in the Legislature to amend CESA to expressly authorize incidental take for development purposes.

It is important to note that PCL has no impact on the Metropolitan's Stephen's Kangaroo Rat take authorization which was upheld by Moreno Valley since the challenge to that authorization was not filed on a timely basis and there had been detrimental reliance Metropolitan. It should also be stressed that PCL did not in any way reach the issue of the Department's incidental take authority under the Natural Community Conservation Planning Act. That issue is currently being litigated in a lawsuit brought against the Department and Metropolitan with respect to Metropolitan's Lake Mathews MSHCP/NCCP.

Hayden v. Fish and Game Commission

On a 2-2 vote, the California Fish and Game Commission failed to take action regarding an appeal from the trial court's ruling ordering the Commission to refer Senator Hayden's petition to list the Spring Run salmon to the Department of Fish and Game for its recommendation. The Commission will now designate the Spring Run as a "candidate" species--protecting it from "take" under the California Endangered Species Act--while the Department considers whether to recommend that it be listed as endangered. The Commission will make the final listing decision on the Department's recommendation. The Commission has scheduled two hearings to consider what, if any, management measures should be adopted to protect the Spring

Run pending the final listing decision. The State Water Contractors had intervened in the litigation to support the Commission and had anticipated joining in any appeal filed by the Commission. The Contractors believe that an appeal without the participation of the Commission has very little chance of success and could result in harmful appellate precedent. Consequently, the Contractors have decided not to appeal on their own. The Contractors will, however, participate in the upcoming hearings and any additional proceedings on the proposed listing.

American Mining Company v. U.S. Army Corps of Engineers

In February we reported that on January 23, 1997, in a very significant decision, a Federal District Court held that the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) had illegally adopted a regulation, known as the "Tulloch rule" which had expanded the wetlands activities subject to regulation by those agencies under section 404 of the Clean Water Act to include "incidental fallback" (i.e., dirt falling off the edge of a shovel or bucket) by defining it as a "discharge of dredged material". The effect of the rule was to empower the government to regulate land-clearing and excavation activities in wetlands that previously had not been regulated.

After the District Court's January ruling, the government filed a motion to limit the injunction to benefit only the plaintiffs and their members. On April 2, 1997, the District Court denied the government's motion stating, "[i]n effect, defendants would have the Court's judgment provide -- quite incongruously -- that the rule is declared invalid and set aside, but henceforth the [defendants] should feel no limitation on applying it to anyone else." The District Court rejected all of the government's arguments concluding that, "if the government believes that the Court has misinterpreted the law, the appropriate remedy is congressional action or appellate review."

Litigation Concerning Local Regulation of Water Softeners

The Fourth District Court of Appeal filed its decision in Water Quality Association v. City of Escondido on March 19, 1997. The appellate court affirmed the decision of the lower court invalidating an ordinance of the City of Escondido, which prohibited the future installation of self-regenerating water softeners and provided that existing self-regenerating water softeners be removed upon resale of residential property. The ordinance was based on a Model Ordinance of the San Diego County Water Authority, and was enacted because these types of water softeners discharge a substantial amount of salt in wastewater systems and impair the ability to use reclaimed water for appropriate nonpotable purposes. The court adopted the reasoning of the Second Appellate District in a similar case involving the same issues and arguments, Water Quality Association v. County of Santa Barbara (1996) 44 Cal.App.4th 732, 52 Cal.Rptr.2d 184), and held that the ordinance was preempted by state law, which allows residential consumers to use these types of water softeners if the water softeners meet the water hardness and conservation measures specified in that law. Both appellate courts noted that, if

the parties desired to further restrict on-site residential water softeners, they would have to seek amendment or repeal of the state statutory scheme. No appeal will be sought because the Supreme Court recently refused to consider the appeal of the Santa Barbara litigation.

II. Litigation to Which Metropolitan is a Party

Metropolitan Water District v. All Persons Interested

The Imperial Irrigation District has filed (1) a demurrer to Metropolitan's complaint, which seeks validation of the wheeling rates adopted by the Board on January 15, 1997 and the resolution pledging revenues from those rates as security for Metropolitan's commercial paper and (2) a motion to transfer the action to a "neutral" county. In its demurrer, Imperial asserts that the validation procedures are not available to Metropolitan with respect to the wheeling rates and the commercial paper resolution, that the wheeling rate is not in compliance with the wheeling statute in any case and that the summons on the action is technically flawed. The motion to transfer is scheduled for May 19, 1997 and the demurrer on May 30, 1997. If the motion to transfer is successful, hearing on the demurrer likely will be delayed. The General Counsel, with outside counsel, is discussing the venue issues with counsel for Imperial and is preparing to defend the demurrer.

The time to file responses to the validation action expired on April 15, 1997. (By stipulation, the San Diego County Water Authority has until June 15, 1997 to respond.) Besides the Imperial filings, an organization associated with the University of San Diego School of Law known as the Center for Public Interest Law filed a joinder to Imperial's demurrer, and Thomas Graff of the Environmental Defense Fund filed a declaration in support of Imperial's demurrer. In addition, the Northern California Water Association has delivered a letter to the court expressing its interest in the litigation because of potential water transfers to Metropolitan's member agencies and the possibility that it may seek to intervene. The General Counsel is unaware of any other responses to the litigation.

CPA Project Cases (Tin Mine Ranch Partners II v. MWD; Eagle Valley Estates v. MWD)

On April 14, 1997 the Riverside County Superior Court issued its ruling denying a petition for writ of mandate which had alleged that Metropolitan's Final Environmental Impact Report (FEIR) for the Central Pool Augmentation and Water Quality Project violated the California Environmental Quality Act in several respects. Specifically, the petitioner had alleged, that the FEIR was inadequate in that it failed to provide sufficient analysis of seismic issues, failed to adequately address certain land use issues, omitted necessary information and was inadequate with respect to its project description, and did not contain an adequate explanation regarding the disposal of dirt from construction of the tunnel portion of the project. The petitioner also contended that Metropolitan had improperly added a new outlet tower for Lake Mathews to the project description and improperly announced in the FEIR that the portion

of the pipeline running beneath the Santa Ana Mountains would be one large pipe, rather than two smaller pipes. In its well written ruling, the court discussed and rejected each of petitioner's contentions and denied the petition. The petitioner has 60 days from entry of the trial court judgment in which to file a notice of appeal.

Ameron v. Pascal & Ludwig
Cross Action: Pascal & Ludwig v. Ameron and MWD

This is a new case arising from a construction contract dispute. To facilitate modification of a freeway interchange, CalTrans and Metropolitan entered into an agreement to relocate the Calabasas Feeder. The contract for relocation of the 54" pipeline was awarded to Pascal & Ludwig Engineers on March 8, 1994. Before issuing the Notice to Proceed on April 7, 1994, Metropolitan successfully tested a new type of pipeline coating. Metropolitan decided to use this project to field test this new coating and included it in the specifications for the pipe to be used in the relocation.

After the Notice to Proceed was issued, Ameron, the pipe fabrication subcontractor made several attempts to manufacture pipe with the new coating. In each instance the pipe was rejected. Finally, Pascal & Ludwig requested a change to standard coating and proposed a credit to Metropolitan because pipe with standard coating is cheaper to manufacture. Pascal & Ludwig also stated that it could meet the original shutdown date of December 19, 1994, if the change to standard coating was immediately approved. Metropolitan agreed to the change.

In late October, 1994, Pascal & Ludwig mobilized to the job site and in early November, 1994, the first pipe sections were received. The job was not completed, however, until June 29, 1995. The reasons for the delay are a matter of dispute between the parties.

Metropolitan alleges that it had nothing to do with the delay and that Pascal & Ludwig bears responsibility. The time specified for completion of the work was exceeded by 175 calendar days, for total assessed liquidated damages of $52,500.00. This amount was deducted from the final payment, along with a $62,072.00 credit arising from the deleted pipe coating and savings incidental thereto.

Pascal & Ludwig alleges Ameron was responsible for the delay and thus Pascal & Ludwig's damages. Pascal & Ludwig refused to pay Ameron's final invoice of $129,836.56. Ameron acknowledges a 28-day delay in delivery of pipe, but alleges that Pascal & Ludwig was not ready for the pipe on the due date and that after the pipe was delivered, the delay occurred due to other factors.

Pascal & Ludwig alleges misfeasance by Metropolitan caused the delay, including misrepresentations of facts in plans, specifications and other materials and providing plans, specifications and other materials which were not accurate, workable, correct and sufficient. It also alleges that it did not discover that its damages were caused by defects in these documents until it obtained access to Metropolitan's design records in August 1996.

Ameron sued Pascal & Ludwig on October 21, 1996. Pascal & Ludwig filed its Answer and a Cross-Complaint against both Ameron and Metropolitan on December 6, 1996. The Cross-Complaint was served on Metropolitan on December 16, 1996. Metropolitan filed its Answer to the Cross-Complaint on February 6, 1997.

Kevin Nolen v.MWD

Nolen, a Pedus security guard, was pushed by a Metropolitan employee who was demonstrating a prior incident on October 18, 1993. Nolen fell backward and injured his back.

Nolen underwent a partial laminectomy and microdiskectomy. An agreed upon medical examiner attributed 75% of his damages to the subject incident and 25% to the pre-existing condition. Nolen was also rated as permanently disabled and he alleges lost wages for two years.

Metropolitan's Motion for Summary Judgment was granted by the trial court on June 13, 1995. The ground for the motion was that Nolen was Metropolitan's special employee at the time of the injury and his sole remedy was therefore Workers' Compensation.

On March, 25, 1997, however, the Court of Appeal reversed the summary judgment, finding that the issue of special employment was a triable issue of fact. The case will now return to the Superior Court for trial, probably within the next six months.

Maria Magno v. Luke

In our February 1997 report, we informed you that Metropolitan had secured a defense arbitration award in this personal injury case. On March 4, 1997, judgment was entered on the arbitration award. We are therefore closing this file after securing a judgment on Plaintiff's complaint and a $750 settlement on Metropolitan's Cross-Complaint

Bien v. MWD

On April 25, 1996, William Bien, an employee of a subcontractor at the Henry J. Mills Water Treatment Plant expansion, slipped and fell on painting material, allegedly sustaining severe personal injuries. On April 16, 1997, Metropolitan was served with a lawsuit alleging Bien was injured due to a dangerous condition of Metropolitan's property. However, Metropolitan will incur no costs in the defense or resolution of this case. Under the terms of the contract with the general contractor on the Mills expansion, M. A. Mortenson, Metropolitan has tendered the defense of this case to Mortenson's insurance carrier. We shall monitor the case to its conclusion.

Ramon Becerra v. MWD
Jose Velazquez v. MWD

These two new cases concern workers who were injured at the Eastside Reservoir Project and who have sued Metropolitan for maintaining a dangerous condition of public property. Again, Metropolitan will avoid any expenses arising from these cases. Both cases have been assigned by Hartford, the general liability insurance carrier under the Eastside Owner Controlled Insurance Program, to insurance defense law firms. We shall also monitor these cases to their conclusions.

CTSI Corporation v.MWD

On September 13, 1996, the State Board of Equalization ("Board") determined that CTSI owed a total of $93,518.59 in taxes and interest. The Board determined that CTSI was not Metropolitan's agent when it purchased and warehoused toilets under the Ultra-Low-Flush Toilet Replacement Program ("Program") and that fees for these services were therefore taxable. On September 19, 1996, CTSI demanded that Metropolitan assume the cost of contesting the Board's determination and pay any amount ultimately assessed by the Board.

CTSI also filed a Petition for Redetermination with the Board. We retained Marcy Jo Mandel, of O'Melveny and Myers, to represent Metropolitan's interests in the Redetermination proceedings. Ms. Mandel contacted CTSI with respect to the hearing on the Petition for Redetermination. Pending the outcome of this case, CTSI agreed to Metropolitan's participation. Ms. Mandel feels that success in the Redetermination proceeding is likely.

Concurrently, on November 14, 1996, CTSI filed and served a Complaint for Declaratory Relief. We assessed a finding of liability in this matter to be probable. The tax audit period was July 1, 1993, through June 30, 1995. This period includes receipts for all three phases of the Program. The contracts for the first and second phase unambiguously state that Metropolitan " . . . will pay all applicable sales tax." Although there is some ambiguity in the sales tax language in the contract for the third phase, a declaration that Metropolitan is responsible for sales tax under that contract was also considered likely.

Because of the likelihood of CTSI's success at trial, Metropolitan initiated settlement discussions early. Initially, CTSI insisted that Metropolitan pay for an attorney of its choosing to represent it in the Redetermination proceeding. We felt that it was unreasonable to pay for two sets of attorneys to represent, essentially, the same position. We, therefore, offered to have the attorney representing Metropolitan represent CTSI as well. CTSI eventually agreed to this, but also insisted on approximately $13,000 in attorneys' fees incurred defending the original tax audit and the instant action. We negotiated $6,000 to settle any and all claims arising from the lawsuit, including attorneys' fees. This case settled on April 21, 1997, pursuant to MWD Administrative Code section 9200(a).

III. Resource Matters

Planning and Conservation League et al. v. Central Coast Water Authority, et al.

The California Supreme Court extended the deadline for appellants to file their opening brief on their appeal from the Court of Appeal dismissal until April 21, 1997, on grounds of untimeliness of an appeal from a Superior Court order quashing service of summons upon various of the state water contractors, including Metropolitan. The attempted service related to an effort by appellants to have the transfer of the Kern Fan Element lands to the Kern County Water Agency declared invalid. The Supreme Court's action in considering the Court of Appeals' dismissal means a delay before the Court of Appeal in resolving other parts of the appeal relating to compliance of the Monterey Amendment with the California Environmental Quality Act. (The Superior Court ruled in favor of the validity of the Amendment in this respect.)

IV. Claims

None to report.

V. Financing

Metropolitan legal staff assisted in drafting a letter which the General Manager filed with the California Attorney General on April 21, 1997, on the applicability of Proposition 218 to metered water rates. Senator Richard Rainey requested an opinion from the Attorney General on whether Article XIII D of the Constitution (Proposition 218) applies to water rates and charges that are based on measured consumptive use, and the Attorney General had requested views from interested parties (including Metropolitan) prior to preparing a response to this question. In addition, Senior Deputy General Counsel Sydney B. Bennion has participated in the Proposition 218 Subcommittee of ACWA's Legal Affairs Committee and Metropolitan joined in the ACWA response to the inquiry from the Attorney General.

VI. Legislative Matters

None to report.

VII. Administrative Matters

The General Counsel's Quarterly Member Agency Dinner meeting was held on April 7, 1997. The guest speakers presented an in-depth discussion on the Impacts of Proposition 218. Several directors from the Legal and Claims Committee, as well as over sixty

attorneys representing various law firms and members agencies, were in attendance. The next meeting is scheduled for July 7, 1997. The speakers will be announced next month.

The Department is in the process of filling the Legal Secretarial vacancy created as a result of the promotion of Linda Omoto in November to the position of Systems Analyst and is also participating in the Summer Student Program sponsored by the District. Applications for two high school students to provide clerical assistance to staff have been submitted to Human Resources.

The Legal Department also participates in a law clerk program. The goal of the program is to provide students currently enrolled in a fully accredited law school with an opportunity to experience the attorney's role directly through application of legal theory to actual legal issues, thereby gaining greater insight into the operation of law and legal systems. Externships are an opportunity to put legal knowledge to work and to acquire lawyering skills in a real, as opposed to an academic environment. These programs offer students invaluable and unique perspectives on the practice of law and can have a significant impact on their careers.

Marc Larson, a third year student at Pepperdine University School of Law and a graduate of St. Lawrence University in Canton, New York, recently completed his externship program with our Department.

Sabina Bhalla, a third year law school student at the University of Southern California, began her externship program in the summer of 1996 and is currently studying for finals and the bar exam. Ms. Bhalla is scheduled to return in September to complete her externship program in December, 1997.

This summer George M. Yin, a third year law school student with UCLA School of Law and a graduate of Cornell University and the London School of Economics, will begin his full time law clerk position with the Department and will continue part-time during the following school year.