



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

September 30, 1997

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

**From:** General Counsel

**Subject:** Legal Department Report for September 1997

**RECOMMENDATION(S)**

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For information only.

**EXECUTIVE SUMMARY**

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This report discusses significant matters which the Legal Department was concerned with during the month of September 1997.

**DETAILED REPORT**

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**I. Recent Developments of Interest to Metropolitan**

Delta Wetlands Water Rights Application

James Roberts of the Legal Department worked with other Metropolitan staff and staff from other California Urban Water Agencies (CUWA) to prepare CUWA's written closing argument on the water rights application by Delta Wetlands. The closing arguments were due on October 1; reply arguments are due October 22. As it has throughout the proceeding, CUWA focused on the project's potential to exacerbate disinfection by-product, salinity and other drinking water quality problems.

Delta Wetlands Properties v. California Dept. of Fish and Game

Delta Wetlands filed this petition for writ of mandate in the Sacramento Superior Court on August 26, 1997. Pursuant to its authority under the California Endangered Species Act, Fish and Game has adopted a Biological Opinion which concludes that Delta Wetlands' proposed island reservoir project in the Delta will jeopardize certain listed fish species. Fish and Game then participated in Delta Wetland's application proceeding and urged the State Board to adopt additional operational constraints to mitigate for this jeopardy. In this action, Delta Wetlands argues that the Biological Opinion does not comply with the substantive and procedural requirements of the CESA and, if followed, would make its project infeasible. The petition requests the court to set aside Fish and Game's Biological Opinion and to determine that the State Board is not required to adopt the opinion's measures as permit conditions in any water rights permit issued to Delta Wetlands.

**II. Litigation to Which Metropolitan is a Party**

MWD v. All Persons Interested (Wheeling Rates Validation Action)

Judge Kay denied the Environmental Defense Fund's (EDF) request to join in this litigation on September 16, 1997. Metropolitan had opposed EDF's request. At the same hearing, the judge allowed the Chemehuevi and Quechan Indian Tribes, Inyo-Mono County Farm Bureau and Cadiz Land Company to join in the action as defendants. Metropolitan had agreed not to oppose the request of these parties. Metropolitan also agreed to the court's request to move the trial date four weeks to November 7, 1997 to accommodate the new parties. Finally, the court granted Metropolitan's request to designate a "Liaison Counsel" to coordinate scheduling, notices and briefing among the opposing parties and to not expand the current scope of discovery. The court's order is more fully described in a letter of the General Counsel to the Board of Directors dated September 19, 1997.

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

Plaintiff has filed an appeal from the trial court's decision which denied plaintiff's request to require the Bureau of Reclamation to lower Lake Mead to protect habitat of the southwestern willow flycatcher and to invalidate United States Fish and Wildlife Service's Biological Opinion for the Bureau of Reclamation's water and power operations on the Lower Colorado River. The Biological Opinion includes an incidental take authorization that authorizes the Bureau to continue its operations despite the fact that it may "take" listed species as an incidental effect of those operations. Plaintiff also is seeking an expedited hearing on the appeal; Metropolitan and other parties have filed oppositions to that request.

CTSI Corporation v. MWD

Pursuant to the Board's authorization, given at its September 10, 1997 meeting, the parties have agreed to and consummated a settlement whereby each party will dismiss its complaint, and waive all costs in these proceedings. In addition, the District has agreed to send two memoranda, one to Conservation Branch staff and the other to member agency General Managers, confirming the District's ongoing policy of remaining neutral with regard to member agency vendor selection. This litigation arose out of the District's Phase 3 Ultra Low Flush Toilet distribution contracts with its third-party vendor, CTSI Corporation. Upon termination of the contracts in early 1996, disputes between the parties led to charges by each that the other had breached the contracts. The matter was tried to a jury for more than four weeks in May, 1997, with each party claiming damages in excess of \$1,000,000. A verdict was rendered in favor of CTSI Corporation in the amount of \$149,222, but, upon motion, the trial court granted a new trial as to all issues, currently scheduled for February 4, 1998. The settlement between the parties vacates that trial date, and closes this matter.

**III. Resource Matters**Hayden v Fish and Game Commission

The California Fish and Game Commission has appealed the trial court's decision in this case that the Commission's special order authorizing the incidental take of Sacramento River spring run salmon (pending the current proceeding to determine whether to list the spring run under the California Endangered Species Act) was adopted in violation of the Administrative Procedure Act. The appeal automatically stays the trial court's order, allowing the special incidental take order to continue in effect pending resolution of the appeal. Plaintiffs have moved to have the Appeals Court dissolve the automatic stay, which would reinstate the trial court's order invalidating the special order pending appeal. That motion will be heard on October 7, 1997.

Electric Industry Restructuring

On September 2, 1997, Metropolitan filed comments at the Federal Energy Regulatory Commission on the final filings by the California Independent System Operator and Power Exchange. We anticipate that FERC will issue a decision in October approving or modifying the tariffs and associated documents filed by the ISO and PX, which action is necessary for a January 1, 1998 implementation. On September 17, 1997, Metropolitan filed a Motion for Leave to File Comments at FERC responding to the September 2 comments of the California Public Utilities Commission; the CPUC argued for prompt conversion of existing contract terms and conditions to those found in ISO and PX tariffs and protocols.

**IV. Claims**

None to report.

**V. Financing**

The proposed program for investment of funds through time deposits in small banks within Metropolitan's service area, which is being presented to your Board this month, was structured based on input from Legal Department staff. The Legal Department will actively participate in the implementation of this program, if approved by your Board.

Legal Department staff are working with Bond Counsel to prepare the Proposed Eighth Supplemental Resolution to Metropolitan's Master Resolution for Water Revenue Bonds. The Eighth Supplemental Resolution has been prepared to authorize additional Water Revenue Bonds, and will be presented to your Board for consideration prior to year end. It is anticipated that the bonds will be authorized and issued in one or more series as funds are required for construction of the Eastside Reservoir Project, Inland Feeder and other projects in the Capital Improvement Program.

**VI. Legislative Matters**

Governor signs legislation granting DFG authority to permit the incidental take of candidate, threatened, and endangered species

On September 26, 1997 Governor Wilson signed into law SB 879 which amends the California Endangered Species Act (CESA) to expressly authorize the California Department and Fish and Game (DFG) to issue a permit for the take of endangered, threatened, or candidate species so long as the take is incidental to otherwise lawful activities; the impacts of the taking are minimized and fully mitigated; and the permit applicant provides adequate funding to implement the necessary mitigation measures. The take permit cannot be issued if the DFG finds, based on the best scientific and other information, that the continued existence of the species would be in jeopardy. However, the required mitigation cannot be more than that which is roughly proportional in extent to the impact of the authorized taking. Where various mitigation measures are available, the required measures must maintain the permit applicant's objectives to the greatest extent possible and those measures must be capable of successful implementation. These limitations on mitigation clarify that the State continues to have the obligation to provide for the recovery of endangered and threatened species and cannot shift that responsibility to others simply because they need an incidental take permit.

The legislation also is important because of its provisions that "grandfather" all take permits that were issued prior to April 10, 1997. The legislation also provisionally

DFG between April 10, 1997 and January 1, 1998 so long as DFG certifies that the permit meets the conditions set forth in the legislation.

SB 879 is a compromise that resulted from intense negotiations among Senator Johnston and other key legislators, the Sierra Club, the National Audubon Society and the Planning and Conservation League representing the environmental community, and representatives of the regulated community and the Wilson Administration. Metropolitan was heavily involved in these negotiations. The April 10, 1997 ruling of the First Appellate District Court of Appeal in Planning and Conservation League, et al. v. the Department of Fish and Game (PCL) was an important catalyst in bringing about this compromise. In PCL the Court held that DFG lacked authority under CESA to issue permits allowing the "incidental take" of candidate, threatened, and endangered species. The Court also indicated that it was for the legislative rather than the judicial branch to provide an appropriate remedy. That ruling was superseded by a grant of review by the California Supreme Court. However, the Supreme Court would not have issued its ruling until at least the Spring of 1998. The uncertainty of what the Supreme Court would hold gave the negotiating parties an additional incentive to strike a reasonable compromise which expressly authorizes incidental take for future projects and also "grandfathers" all previous take authorizations.

We previously reported that a trial court in the Riverside County had ruled that the incidental take authorization for Metropolitan's Lake Mathews MSHCP/NCCP was invalid because DFG lacked express incidental take authority under CESA. The legislation's grandfather provision will retroactively validate the Lake Mathews incidental take authorization and will make the trial court ruling and pending appeal moot except for issues related to litigation costs and attorney fees.

## **VII. Administrative Matters**

### Member Agency Legal Counsel Dinner

Committee members are cordially invited to attend the Department's quarterly member agency dinner meeting on Monday, October 13, at 6 p.m. in the Oasis Cafeteria. The guest speaker is Professor Steve Erie from the University of California, San Diego. He will speak on the historical role of water agencies in the growth and development of Southern California and trends for the future. A representative of the San Diego County Water Authority will respond to Professor Erie's presentation.

### Legal Department Retreat

The Department's off-site retreat was conducted earlier this month. The retreat was beneficial in that staff gained a clearer understanding of the Department's mission, vision and guiding principles; identified the most critical issues facing the Department for the next year; and focused on individual development and growth plans in accordance with the Department's

mission. During the focus sessions, the Department's mission statement was revisited and several goals and objectives were identified.

The facilitators will continue to work with the Department's planning committee to develop an implementation plan with timetables and deliverables in responding to the goals and objectives brought forward at the retreat.