MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Report

June 30, 2004
Legal Department

• General Counsel's June 2004 Monthly Report

Summary

This report discusses significant matters in which the Legal Department was involved during the month of June 2004.

Detailed Report

1. Litigation/Claims To Which Metropolitan Is A Party

a. *San Gabriel Basin Water Quality Authority, et al. v. Aerojet-General, et al.; Aerojet-General v. Metropolitan*

As previously reported, this is a third-party action arising from litigation currently pending in the United States District Court in Los Angeles. The action seeks contribution from Metropolitan and other public agencies under CERCLA for importation and spreading of Colorado River water that is alleged to have contributed to perchlorate contamination, for which Aerojet-General is being sued in the main action.

Metropolitan has entered into a cost-and-defense sharing agreement with member agency Upper San Gabriel Valley Municipal Water District and is cooperating with the other public agencies. On June 28, 2004, a Status Conference was held before the District Judge to set a briefing and hearing schedule for future proceedings. Primarily, the Order calls for preparation of a master complaint against all of the public agencies and lays out a schedule for responding to the complaint. The master complaint is now due July 6, 2004, with responses due August 17, 2004.

b. *Arizona v. California*

Counsel for the California Parties, the United States and the Quechan Tribe met in Yuma, Arizona on June 16-17, 2004 to discuss possible settlement of the litigation. The General Counsel will present the results of those discussions to the Metropolitan Board in July. In light of the ongoing settlement discussions, the Special Master continued all pretrial and trial dates for an additional thirty days.

c. *Bennett v. Metropolitan*

An inverse condemnation action was filed this month in Riverside County Superior Court. The Complaint by property owners near Lake Mathews alleges that noise from an Upper Feeder airshaft is of such intensity that the disturbance constitutes a "taking" of the otherwise quiet enjoyment of the property. A field inspection made after service of the Complaint reveals that the plaintiffs' home is approximately one-half mile from the air vent shaft. There are at least seven to ten residences closer to the shaft than plaintiffs' property, yet no complaint has been received from them. Plaintiffs' counsel has granted an extension of time to respond so that further investigation can be carried out.

d. *Pacific Coast Steel v. Metropolitan*

This stop notice enforcement action was settled on May 14, 2004. The dispute giving rise to the lawsuit involved $34,524 allegedly owed to a subcontractor by a Metropolitan construction contractor. Metropolitan was named as a defendant because it withheld funds pursuant to a stop

notice. After the other parties resolved the dispute, Metropolitan released the funds and agreed to accept a dismissal of the case in exchange for a waiver of costs and fees, which were nominal.

e. *Shank/Balfour Beatty v. Metropolitan*

The trial date for this case has been continued from June 8, 2004 to September 14, 2004. The settlement with Shank/Balfour Beatty is complete and only the claim of Ameron, the pipe vendor, remains at issue.

f. *State Farm Mutual Automobile Insurance Company v. Metropolitan*

This action was brought by an automobile insurance carrier in subrogation. Metropolitan had previously settled the personal injury portion of this minor traffic accident case with the other driver. Because Metropolitan was liable, it paid the full, verified property damage amount of $5,596 to the carrier.

2. Other Matters Not Involving Metropolitan

a. *New York City v. Catskill Mountains Chapter of Trout Unlimited*

In 2001 the U.S. Court of Appeals for the Second Circuit determined in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* that the conveyance of the city's water supply through a tunnel from an upstate reservoir to a downstate destination in connection with a statewide distribution system involved the "addition of a pollutant" (suspended solids and turbidity) and required a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act (CWA). On remand, the District Court imposed civil penalties of $5.7 million, which the city has appealed to the Second Circuit. Because of the important issues left unresolved by the Supreme Court in the *South Florida Water Management District v. Miccosukee Tribe* case, Metropolitan has joined with other western water suppliers and the attorney general offices of several states in preparing and funding an amicus brief to be filed with the court. *See* http://www.tourolaw.edu/2ndCircuit/October01/00-9447.html

b. *Spirit of the Sage v. Babbitt*

Last December, the federal trial court ruled in favor of the plaintiffs' challenge to the "No Surprises Rule" as violating the federal Endangered Species Act and the Administrative Procedures Act. The No Surprises Rule provides assurances that the U.S. Fish and Wildlife Service (FWS) will not at a later time require additional mitigation or other compensation so long as the incidental take permittee is in compliance with a habitat conservation plan (HCP). The court did not rule on the validity of the No Surprises Rule, but found that the No Surprises Rule is necessarily intertwined with the Permit Revocation Rule, which the court invalidated.

In June, we reported that the FWS addressed the court's ruling by issuing two notices in the Federal Register. The first notice is a final rule that immediately withdraws the Permit Revocation Rule as applied to incidental take permits. 69 Fed. Reg. 29669 (May 25, 2004). In conjunction with the withdrawal, the FWS is reproposing the Permit Revocation Rule in a separate rulemaking. *See* 69 Fed. Reg. 29681 (May 25, 2004). This proposed rule would allow the FWS to revoke an incidental take permit only if take of listed species caused by the permitted activity will appreciably reduce the likelihood of survival and recovery in the wild of one or more of the covered species. Metropolitan will review and submit comments on the proposed rule.

On June 10, 2004, the trial court, in response to the plaintiffs' motion for clarification of its December ruling, ordered: 1) that the FWS complete its action on a new Permit Revocation Rule by December 10, 2004; 2) that until the FWS adopts a new Permit Revocation Rule, all existing incidental take permits containing No Surprises assurances shall be subject to the general revocation standard applicable to other FWS permits; and 3) that until the FWS completes its actions on a new Permit Revocation Rule, it is prohibited from approving new incidental take permits containing No Surprises assurances. *See* *http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/pdf/04-11741.pdf*

3. Finances

The Legal Department assisted Finance staff and outside counsel with restructuring of existing escrows to reduce negative arbitrage. The Legal Department also reviewed and commented on interest rate swap documents from three counterparties for potential new interest rate swap transactions.

4. Administration

The General Counsel's annual performance was reviewed by the Board. Additionally, the Legal Department's proposed budget and workplan for 2004/05 were approved.

Senior Deputy General Counsel Jarlath Oley is retiring from the Legal Department, to be effective July 28, 2004. Jarlath represented Metropolitan in a wide variety of matters for the past thirty-four years, serving with eight different General Counsels. His knowledge and skills will be missed. A luncheon honoring his retirement is scheduled for July 8, 2004.