

• General Counsel's 2004/05 Business Plan - First Quarter Update

Summary

This report provides information on the activities of the Legal Department during the first quarter of the 2004/05 fiscal year which contributed toward the attainment of the General Counsel's business plan. Attachment 1 describes in detail the specific activities for this quarter under each of the nine goals approved by the Legal, Claims and Personnel Committee last June.

Attachments

General Counsel's Business Plan for Fiscal Year 2004/05 First Quarter Update

Detailed Report

The attached report describes the Legal Department's progress toward attainment of its business plan goals during the first quarter of the 2004/05 fiscal year.

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GENERAL COUNSEL'S BUSINESS PLAN FOR FISCAL YEAR 2004/05
FIRST QUARTER UPDATE
JULY 1, 2004 – SEPTEMBER 30, 2004

GOAL NO. 1 – STATE WATER PROJECT/CALFED

Provide legal support in carrying out the Board of Directors' policies related to the State Water Project, including maintaining long-term source protection, water quality improvements, and protecting Metropolitan's interests in the State Water Contract.

Activities:

1. CALFED

- a. CALFED Programmatic EIR/EIS Cases – In the consolidated state court cases now on appeal, prepared for argument in defending the trial court's decision that upheld the EIR.
- b. California Farm Bureau v. California Resources Agency – Continued to monitor this challenge to the EIR for the Environmental Water Account for potential Metropolitan involvement to protect our interests in this program.

2. State Water Resources Control Board (SWRCB) Proceedings

- a. Sacramento Valley Negotiations – Provided legal advice pertaining to implementation of the Sacramento Valley Settlement Agreement, focusing on preparation of an EIR/EIS for the resulting Sacramento Valley Water Management Program.
- b. State Water Contractors, MWD, et al. v. SWRCB – Filed an opening brief on the State Water Contractors' (SWC) cross-appeal from the trial court's decision essentially upholding SWRCB's D-1641. The SWC have participated in this litigation to support D-1641 and filed their cross-appeal on the narrow issue of the trial court's decision holding that SWRCB could not rely on the San Joaquin River Agreement/Vernalis Adaptive Management Plan as the mechanism to meet San Joaquin River flow requirements. As cross-appellants, SWC also are developing responsive briefs in defense of D-1641 against appeals filed by parties opposed to that decision.
- c. SWRCB Triennial Review – Participated with other SWC staff in the SWRCB's statutorily required review of its 1995 Bay-Delta Water Quality Control Plan. The Plan is the basis for flow, water quality objectives, and other operational requirements imposed on the SWP. Revisions to the flow requirements or objectives could positively or negatively impact the SWP. SWRCB workshops and hearings are scheduled for various dates during late summer and fall.

3. State Water Contract

- a. Hyatt-Thermalito Cost Allocation Issues – Assessed and analyzed the legal merits of a claim filed in June 2004 by Kern County Water Agency (KWCA). The claim, which was filed with the State Board of Equalization (SBE), asserts that all revenues from energy generated by Hyatt-Thermalito must be credited to the Delta Water Charge. Legal staff are continuing to work on a strategic plan and approach for defending against this claim and any lawsuits that may be filed by KWCA. To date, no action has been taken on this claim by the SBE.
- b. Power Cost Allocations – Continued to prepare for potential litigation regarding SWP power cost allocations.

4. Oroville Reservoir

- a. Oroville Relicensing – Provided legal support at various plenary group, work group, and settlement negotiation meetings in the ongoing FERC relicensing process for Oroville Reservoir. Legal staff continued to work on a strategic plan and approach for the ongoing settlement negotiations with DWR, federal and state regulatory agencies, and various non-governmental entities concerning appropriate protection, mitigation, and enhancement measures to be included as conditions of the license for the new term. DWR must submit an application for renewal to FERC in January 2005, and the existing FERC license expires in 2007.

5. Transfers

- a. 2005 Sacramento River Transfers – Worked with the SWC Joint Powers Authority and other SWC staff to develop water transfer option agreements for 2005. Legal staff participated in negotiating transfers; drafted a Specific Project Agreement under which the SWC Joint Powers Authority would facilitate and act as banker for the SWC buyers; and prepared a draft water transfer option agreement.
- b. Yuba County Water Agency Transfer – Participated in negotiation of a “Tier 1” water transfer agreement between Yuba and the buyers (SWP, LADWP, and Environmental Water Account) and a “Tier 2” agreement among the buyers dividing the water purchased from Yuba. The agreements are based on principles previously negotiated. Under the 20-year agreement, Yuba will make available as much as 200,000 acre-feet of water to the buyers.

6. Area of Origin Protections

- a. *El Dorado Irrigation District v. SWRCB* and *El Dorado County Water Agency v. SWRCB* – Participated in drafting the SWC's opening brief on appeal from the trial court opinion ordering SWRCB to delete Term 91 from the El Dorado districts' permits and remanding the matter to the SWRCB for further proceedings.

7. Endangered Species Act (ESA)

- a. United States Fish and Wildlife Service (USFWS) Review of Delta Smelt Listing – Consulted with SWC staff and others to determine how to respond to USFWS' decision to continue to list the delta smelt as endangered after a status review.
- b. *Environmental Protection Information v. National Marine Fisheries Service* – Along with SWC staff, filed comments with National Marine Fisheries Service (NMFS) in its proceedings considering whether the loss of spawning habitat available for the green sturgeon should affect NMFS' previous decision not to list the sturgeon.
- c. NMFS Proposed Critical Habitat Designation for Central Valley Spring-Run Salmon and Central Valley Steelhead – Continued to monitor NMFS' response to comments filed by the SWC and others regarding the designation of critical habitat for the listed Central Valley spring-run salmon and steelhead. NMFS had previously designated habitat for these species, but that designation was invalidated because NMFS failed to consider the economic impacts of the designation.

8. Energy

- a. Federal Energy Regulatory Commission (FERC) Proceedings – Made ten filings at FERC on matters primarily affecting the SWP. Legal staff attended meetings on various aspects of the

ISO's market redesign and submitted responsive comments to the ISO. Legal staff is working closely with DWR's special counsel to coordinate positions on filings and in regulatory hearings at FERC and to provide review and recommendations on documents affecting the SWP.

9. State Water Project Supply and Improvements

- a. Napa Proposal and South Delta Improvement Programs - Continued to provide legal support in implementing: (1) the Napa Proposal; and (2) CALFED's South Delta Improvement Program, which will result in allowing DWR to increase pumping at its Banks pumping plant.
- b. Sacramento Regional Wastewater Treatment Plan Expansion – In conjunction with the SWC and several urban agencies, entered into an agreement to toll the statute of limitations for challenging the EIR for expansion of this wastewater treatment plant and assisted in the development of a feasibility study of measures to offset water quality impacts.

GOAL NO. 2 – COLORADO RIVER

Provide legal support for the Board's policy of ensuring a long-term reliable aqueduct supply.

Activities:

1. Litigation

- a. QSA Litigation – Filed submissions supporting coordination of the QSA cases in Sacramento. Nine lawsuits challenging the validity of, and the sufficiency of, the environmental documents for the QSA and various QSA-related agreements have been coordinated in Sacramento Superior Court. Metropolitan has been named a party in some of these lawsuits. The Legal Department filed demurrers seeking to dismiss some of the lawsuits and challenging the sufficiency of some of the claims therein. Preparation of the extensive administrative records for the various lawsuits is also proceeding.
- b. Arizona v. California – Held several settlement meetings with the other parties in this long-running Supreme Court case involving rights to Colorado River water under the auspices of a jointly selected mediator. As a result of these discussions the parties have exchanged settlement proposals that have been considered by the governing authorities of the various parties. Legal staff are continuing to participate in these settlement discussions. Trial on the Phase I boundary and title issues is currently set to begin in December 2004.
- c. Spirit of the Sage Council v. Norton – In this environmental lawsuit challenging the “No Surprises Rule” as violating the federal ESA and the Administrative Procedures Act (APA), the trial court in June ordered: 1) that the USFWS complete its action on a new Permit Revocation Rule by December 10, 2004; 2) that until USFWS 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 USFWS permits; and 3) that until the USFWS completes its actions on a new Permit Revocation Rule, it and NMFS are prohibited from approving new incidental take permits containing No Surprises assurances. In July 2004, legal staff, along with the other intervenors, appealed the trial court's ruling in its entirety to the D.C. Circuit Court of Appeals. Also in July, legal staff provided legal assistance in the preparation of a letter commenting on the USFWS proposal to reestablish the Permit Revocation Rule and on its relationship with the No Surprises Rule. In August 2004, legal staff, along with the other intervenors, filed motions in the Court of Appeal requesting that it expedite the appeal and stay the trial court's rulings pending completion of the appeal.

- d. Enron Power Marketing, Inc. v. MWD – Prepared a mediation brief in this matter which arises out of power purchase contracts to serve CRA pump-load that were negotiated with Enron at the height of California's energy crisis. Legal staff also prepared a motion to intervene in a proceeding at FERC that was recently expanded by the Commission to determine whether Enron should be required to disgorge profits as a result of its violation of its FERC-approved market-based tariff. In late September, FERC granted the motion, entitling Metropolitan to participate.

2. Storage, Transfers, and Other Programs

- a. PG&E Topock Site – Continued to represent Metropolitan's interests as part of the Consultative Work Group formed to advise and assist the Department of Toxic Substances Control, Colorado River Basin Regional Water Quality Control Board, PG&E, and various other state and federal agencies in expediting cleanup of the site. Legal staff negotiated with PG&E and obtained Metropolitan Board approval for sale of property near the PG&E site to assist in expediting groundwater cleanup plan.
- b. Lower Colorado River Multi-Species Conservation Program – Acted as the hearing officer at three public hearings on the program in July following the issuance in June 2004 of the Draft EIR and the Draft Habitat Conservation Plan for public review. Metropolitan is the lead agency for preparing the environmental impact report on the program in accordance with CEQA. Legal staff also provided legal assistance in reviewing and responding to public comments and in negotiating the implementing agreement for the program. The final program documents are scheduled to be issued with a decision on the program by the U.S. Department of the Interior in December 2004.

GOAL NO. 3 – OPERATIONS

Provide legal advice on statutory and regulatory requirements and compliance for operations programs.

Activities:

1. Litigation

- a. San Gabriel Basin Water Quality Authority, et al. v. Aerojet-General et al.; Aerojet v. Metropolitan – Continued to represent Metropolitan's interests in this third-party action seeking contribution from Metropolitan and other public agencies under CERCLA for contamination alleged to have resulted from the importation and spreading of Colorado River water. Legal staff filed motions seeking dismissal of the action, asserting that Metropolitan is not a responsible party under CERCLA and that other claims were not raised on a timely basis.
- b. Griffith Construction Company v. Metropolitan – Filed an answer in September to this complaint in which contractor Griffith Construction Company is seeking payment for costs incurred in the repair of the Colorado River Aqueduct. Metropolitan was engaged with the contractor and subcontractors for more than a year and believes the contractor and its subcontractors have been provided all compensation due.

2. Environmental Issues

- a. Water Quality Issues – Provided legal support to the Perchlorate Task Force formed to interface with member agencies. Legal staff also provided legal assistance on various legislative issues, including AB 2528, a Metropolitan-sponsored bill intended to eliminate confusion in certain reporting and notification terminology.

3. Energy

- a. Power Contracts – Provided legal assistance in negotiating an amendment to Metropolitan's power sales agreement with PG&E and reviewed related utility service agreements that Metropolitan must execute due to the expiration of certain existing contracts. Legal staff also prepared a claim for participation in the El Paso settlement refund based upon Metropolitan's power purchases for operation of the Colorado River Aqueduct during California's energy crisis.
- b. Cal PX – Provided legal assistance in connection with defense against indemnity claim for activities by California Power Exchange prior to bankruptcy.

4. Real Property

- a. Union Station Facility – Continued to provide legal assistance in negotiating and drafting lease documents for lease space at Metropolitan's Union Station facility.
- b. Miscellaneous – Provided legal assistance on: Jensen sludge project agreements with LADWP; amendment to Lake Skinner recreation facilities lease with Riverside County; Diemer Tank Rehabilitation; surplusings Ormond Beach property; Arroyo Seco draft master lease; and other issues related to Metropolitan properties.

5. Miscellaneous Issues

- a. Desalination – Provided legal assistance in preparing draft seawater desalination agreements which are currently being negotiated with member agencies.

GOAL NO. 4 – CAPITAL PROGRAMS

Provide legal support in the planning, environmental compliance and construction of the board-approved Capital Investment Plan.

Activities:

1. Inland Feeder Project

- a. Shank/Balfour Beatty v. Metropolitan – Legal staff continued to analyze the subcontractor claims and participated in extensive trial preparation in this matter in which Metropolitan and the contractor, Shank/Balfour Beatty, settled their dispute, but the dispute with the pipe manufacturer, Ameron, was not settled. Trial commenced on September 20, 2004.
- b. Shea-Kenny – Evaluated several potential claims arising from the December 25, 2003 mudslide in San Bernardino which caused significant damage to the Arrowhead West portal site. In August, the contractor claims for damage to equipment and the construction site itself were reviewed by a Disputes Review Board chosen by both Metropolitan and the contractor.
- c. Metropolitan v. Campus Crusade for Christ – Worked on preparation of a brief in response to Campus Crusade for Christ's opening appellate brief. Metropolitan's brief is due in October.

2. Diamond Valley Lake

- a. Center for Water Education – Continued to coordinate on Metropolitan's behalf with Center for Water Education in preparation for the beginning of construction of the Center complex. Legal staff assisted the Center with obtaining approval of its Storm Water Pollution Prevention Plan and met jointly with Center and City of Hemet staff to address grading and pad certification issues.
- b. Post-Construction Mitigation Activities – Provided legal support on post-DVL construction issues, including Arcon Homes, Salt Creek, excess land, surplus housing, and West Dam groundwater.

3. San Diego Pipeline No. 6

- a. Acquisition – Provided legal support in obtaining possession of all right of way needed for the north reach.
- b. Board Workshop – Provided legal support in the preparation for and participated in a Board workshop concerning San Diego Pipeline No. 6 alternatives, timing, and delivery point.

4. Environmental Issues

- a. Catskill Mountains Chapter of Trout Unlimited v. City of New York – Filed an amicus brief with the U.S. Court of Appeals for the Second Circuit along with other western water suppliers and the attorney general offices of several states. The brief seeks to overturn a district court decision that the conveyance of water 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.

GOAL NO. 5 – HUMAN RESOURCES

Provide legal support on various human resources issues.

Activities:

1. Labor Negotiations – Provided legal assistance regarding upcoming bargaining unit negotiations on successor MOU's and other meet and confer items.
2. Litigation
 - a. Cargill v. Metropolitan – Engaged in discussions with CalPERS and the plaintiffs regarding Metropolitan's compliance with the Supreme Court's decision in this class action litigation regarding temporary workers' entitlement to regular employment benefits and status. Legal staff have scheduled meetings with CalPERS and the plaintiffs in October in an effort to reach a resolution concerning the CalPERS portion of the *Cargill* litigation.
3. Support of Human Resources
 - a. Human Resource Issues - Provided daily legal advice to Human Resources and represented Metropolitan in personnel litigation and administrative matters. Represented Metropolitan at a number of grievance hearings.

- b. Policies – Provided legal support in updating Operating Policies and the Administrative Code to reflect changes in policy and to ensure uniformity in the application of policy.

GOAL NO. 6 - FINANCE

Provide legal assistance with rates and charges, the issuance of debt obligations, investment of surplus monies, and other financial activities undertaken by Metropolitan.

Activities:

1. Financing

- a. Bonds – Provided legal support in extending the expiration dates of Standby Bond Purchase Agreements providing liquidity support for Metropolitan's Water Revenue Refunding Bonds, 2002 Series A and B. Legal staff and outside bond counsel prepared and negotiated documents for the anticipated sale of up to \$300 million water revenue bonds to finance capital projects. Favorable market conditions also permitted structuring of an issue of water revenue bonds to refinance approximately \$125 million in outstanding water revenue bonds. Legal staff updated disclosure information on Metropolitan for the Official Statements describing both bond issues.

GOAL NO. 7 - LEGISLATION

Provide legal support regarding proposed state and federal legislation that may affect Metropolitan's interests.

Activities:

1. Federal Legislation

- a. CALFED Legislation – Provided legal support, analysis, and drafting in support of legislation authorizing federal agency participation in and funding for implementation of the CALFED program. The House passed its version of this legislation, HR 2828, on July 9, 2004.

2. State Legislation

- a. Energy – Provided legal assistance in drafting text that will enhance Metropolitan's ability to market energy produced by its small conduit hydroelectric facilities as renewable. The bill is awaiting the Governor's signature.
- b. Miscellaneous Legislation – Provided analysis and legal advice on a flurry of last-minute 2004 bills. Legal staff also participated in negotiations regarding: AB 382 (Oller) concerning off-reservation environmental impacts of Native American projects; SB 1334 (Kuehl) concerning Oak Woodlands; and SB 1477 (Sher) and SB 1887 (Sher) concerning water quality and protection of wetlands. Legal staff also provided analysis and legal advice on other bills, including AB 2814 (Simitian) concerning CEQA and SB 18 (Burton) concerning Native American sacred sites. Legal staff successfully participated in consensus amendments to SB 1155 (Machado), dealing with Delta water quality requirements, so that Metropolitan could support the bill, which was enacted. Legal staff worked with the authors to revise SB 1374 (Machado), dealing with third-party impacts of water transfers and AB 2864 (Canciamilla), which would have amended SWRCB fees on water rights holders and restore funding for SWRCB Division of Water Rights; neither of the bills passed.

GOAL NO. 8 - GOVERNANCE

Ensure compliance with statutory and institutional requirements, such as the Metropolitan Water District Act and Administrative Code, the Brown Act, the Political Reform Act, and the Public Records Act.

Activities:1. Litigation

- a. San Diego County Water Authority v. Metropolitan – On July 14, 2004, the California Supreme Court denied the San Diego County Water Authority's petition to review the lower courts' dismissal of the Authority's complaint, with prejudice. This matter involved the Authority's allegation that Metropolitan improperly calculates the member agencies' preferential rights under §135 of Metropolitan's Act. Metropolitan's request to recover its costs is pending.

2. General

- a. Public Records Act – Responded directly and provided legal support to staff in responding to numerous Public Records Act requests.

GOAL NO. 9 – LEGAL DEPARTMENT ADMINISTRATION

Continue to explore and implement ways in which to expand the effectiveness and efficiency of Legal Department operations.

Activities:1. Department Operations

- a. Technology – Implemented LiveNote transcript management system to allow real-time access to court transcripts and depositions, including the ability to search text online, and resulting in lower costs to obtain such transcripts.
- b. Management of Staff – Operated the Legal Department in an effective manner by: conducting regular staff meetings to keep all employees abreast of Metropolitan and Legal Department issues; conducting regular meetings with attorneys to provide direction regarding specific matters; addressing the department's succession planning needs by preparing for and redistributing assignments of the two attorneys retiring from July through October 2004; and performing employee evaluations in a timely manner.