

• General Counsel's September 2004 Monthly Report

Summary

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

Attachments

None.

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, et al. v. Metropolitan Water District, et al.

In August Metropolitan filed motions seeking dismissal of the third-party actions brought against it by Aerojet and other third-party plaintiffs asserting that because it is not an owner, operator, transporter or arranger, as those terms are defined under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act), it is not a proper party to the action. Additionally, Metropolitan has asked the court to dismiss certain causes of action on the basis that the third-party plaintiffs failed to comply with the requirements of California's tort claims act within the statutory time limits. The hearing on Metropolitan's motion is scheduled for November 1, 2004.

- b. QSA Related Litigation

Nine of the QSA cases are now in Sacramento County Superior Court before Judge Candee. Metropolitan is a named party to four of these nine cases. (One case brought against IID only concerning its purchase of the Western Farms property remains in Imperial County Superior Court and two other actions brought in Imperial County have been dismissed.) For the cases in Sacramento, Judge Candee has set a November 5 hearing date for all challenges on the pleadings. Last month, staff prepared and filed Metropolitan's pleading challenges and joined in a challenge filed by Coachella Valley Water District and San Diego County Water Authority. In all, 44 separate demurrers and motions on the pleadings were filed by the various parties.

- c. *Shank/Balfour Beatty v. Metropolitan*

The claim by Shank/Balfour Beatty has been settled, but the pipe vendor, Ameron, continues to seek damages from Metropolitan. The court denied Ameron's motion for summary judgment to dismiss our cross-complaint for false claims. Trial started on Monday, September 20 and is anticipated to last approximately three weeks. The parties waived a jury trial.

2. Other Matters Involving Metropolitan

a. Sale of Metropolitan's property near Topock.

On September 30, 2004 escrow closed on the sale of the 100-acre Metropolitan parcel located near Pacific Gas & Electric's (PG&E) Topock Compressor station. In August, the Board approved the sale of the parcel to facilitate PG&E's expansion of facilities to treat chromium-contaminated groundwater. The current schedule calls for PG&E to have the treatment facilities operational by December of this year.

b. State of California ex rel. Lockyer v. FERC

In this case arising out of the California energy crisis, the Ninth Circuit found that the Federal Energy Regulatory Commission (FERC) erred in concluding that retroactive refunds were not an available remedy. The case was remanded to FERC for reconsideration.

The Ninth Circuit's express recognition of FERC's ability to order retroactive refunds for Federal Power Act violations is an important development. In the California ISO (Independent Power Exchange) refund proceeding, FERC had long held the position it lacked such authority. Nevertheless, it is unclear what FERC will do on remand, and some entities that would face enhanced liability have executed comprehensive settlement agreements. The decision may provide an opportunity for Metropolitan and the Department of Water Resources to obtain refunds for some higher priced energy contracts executed during the energy crisis, although FERC may decide that no additional remedies are warranted.

3. Other Matters Not Involving Metropolitan

a. Association of California Water Agencies et al. v. Evans

Plaintiffs in this action have been awarded \$317,530 in attorneys fees and costs. Plaintiffs had alleged that the National Marine Fisheries Service (NMFS) illegally designated critical habitat for Central Valley steelhead and salmon without first considering the economic impact of the designation as required by the Federal Endangered Species Act. While this litigation was pending, NMFS entered into a consent decree in a virtually identical action filed by the National Association of Home Builders in another federal district court agreeing to vacate the designation of critical habitat and to reconsider the designation only after taking economic impacts into account. NMFS then moved to dismiss ACWA's case as moot and argued that plaintiffs in that case should not collect attorneys fees. The court held that ACWA's action was a "catalyst" to NMFS' agreeing to enter into the consent decree in the Homebuilders' case that the ACWA plaintiffs therefore had prevailed and are entitled to attorneys fees and costs. While Metropolitan was not a named plaintiff, it did contribute \$25,000 towards ACWA's fees and costs and should receive a portion of the fees and costs recovered.

b. El Dorado Irrigation District v. SWRCB and El Dorado County Water Agency v. SWRCB

Appellants—State Water Resources Control Board, the State Water Contractors, the San Luis & Delta-Mendota Water Authority and the Department of Water Resources (as an *amicus*)—filed their opening briefs in this action before the California Court of Appeals. Appellants are challenging a superior court decision ordering the SWRCB to delete SWRCB's standard "Term 91." Term 91 protects the state and federal water projects from diversions by senior water rights holders at times during the year when there is insufficient natural flow, absent the flows from the projects, to support diversions under these senior rights.

4. Finances

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 refunding 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.

5. Administrative Matters

Senior Deputy General Counsel Norman Flette is retiring from the Legal Department on October 16, 2004. Norm represented Metropolitan in a wide variety of environmental matters for the past twelve years and previously served for approximately twenty-three years as a Deputy Attorney General with the California Department of Justice. Norm's extensive knowledge, particularly in the area of environmental law, will be missed. A luncheon honoring Norm's retirement will be held on October 6, 2004.