

● General Counsel's October 2004 Monthly Report

Summary

This report discusses significant matters in which the Legal Department was involved during the month of October 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

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 Special Master continued the November 1 hearing to December 13, 2004.

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

The claim by Shank/Balfour Beatty has been settled, but the case continues because Ameron, the pipe vendor, seeks damages from Metropolitan. Both sides have completed presenting their cases. Closing arguments will take place on November 8, with a decision anticipated in January, 2005.

2. Other Matters Involving Metropolitan

- a. Oroville Relicensing

In October, there were public meetings between the Department of Water Resources (DWR) and stakeholders, including the State Water Contractors (SWC) and Metropolitan, occurring an average of one to two times per week. In addition, a number of other meetings were held with individual stakeholders in an effort to facilitate resolution of various outstanding issues and concerns. As before, fisheries, recreation and socioeconomic issues remain the primary focus of settlement negotiations.

DWR also established a Drafting Committee, which is charged with the task of crafting a proposed settlement agreement. The Drafting Committee is primarily composed of legal counsel from various stakeholder agencies. Metropolitan is represented by Legal Department staff at these meetings. The Drafting Committee met three times in October and will continue its work in November.

Finally, a workshop was held for the SWC Board, at which the status of the license application and settlement negotiations were discussed. The strategy and approach for continued settlement negotiations with DWR and various stakeholders also were discussed, with the Board providing specific direction to the SWC negotiation team.

3. Other Matters Not Involving Metropolitan

a. Friends of the Santa Clara River v. Castaic Lake Water Agency

The Fifth District Court of Appeal filed a published opinion on September 22, 2004 invalidating an Urban Water Management Plan (Plan) prepared by the Castaic Lake Water Agency (Castaic Lake). Under the Urban Water Management Planning Act (Act) an urban water supplier is required to prepare and adopt a Plan containing information and analyses specified in the Act.

According to the Appellate Court's opinion the administrative record for the Plan indicated that a significant plume of perchlorate contamination existed near wells pumping from the Saugus Aquifer within Castaic Lake's service area, and that increased pumping from that aquifer during dry periods could spread the contamination and reduce the amount of water supply that could be anticipated from the aquifer. The Plan recognized that contamination existed, but that perchlorate had not been found in the Alluvial Aquifer; that technology existed to treat the water for \$300 per acre-foot; that Castaic Lake and the owners of the site were discussing groundwater clean-up; and that available management options created a high probability that the groundwater yield discussed in the Plan could be sustained.

The Appellate Court decided that this discussion was not adequate to meet the Act's requirements to "describe the reliability of the water supplies and vulnerability to seasonal or climatic shortage" or to "describe plans to replace [vulnerable supplies] with alternative sources or water demand measures." According to the Appellate Court, the Plan's discussion of the potential impact on groundwater supplies lacked necessary specificity. In particular, the Court found that the Plan did not state how fast the contamination is spreading, how additional pumping might affect that rate and how extensive the contamination may become in the 20-year planning horizon. The Plan also was unclear on what stage of development the groundwater cleanup and treatment plan had reached, how long it would take to implement it or what uncertainties might be involved. Because of these omissions in the analysis of the reliability of groundwater supplies, the Court held that the Plan was fatally flawed, and ordered the trial court to grant a writ of mandate vacating Castaic Lake's Plan.

As far as we are aware, this is the first time a Plan has been successfully challenged. This may indicate a willingness by the courts to second-guess urban water suppliers' Plans. Staff will continue to monitor this and other water planning litigation.

b. Natural Gas Anti-Trust Cases

Through the efforts of Metropolitan's staff, Metropolitan will obtain approximately \$7 million, and the State Water Project will obtain approximately \$12 million, based on claims in the antitrust settlement arising out of El Paso Corporation's alleged manipulation of the natural gas market during California's energy crisis. Initially, the El Paso Settlement Steering Committee denied the claim of Metropolitan and the State Water Project for participation in settlement proceeds allocated to "municipal electric utilities." However, counsel for Metropolitan and State Water Project successfully argued that the settlement agreement was intended to remedy damages incurred by all entities purchasing electricity at wholesale, that the settlement documents provided no definition of municipal electric utility, and that both entities met the definition of a Local Publicly Owned Electric Utility as set forth in the Cal. Public Utilities Code

(for Metropolitan) and the Cal. ISO Tariff (for Metropolitan and the State Water Project). Since Metropolitan pays approximately 70 percent of the SWP power costs, our net benefit exceeds \$15 million. Operations Planning Unit staff worked with Legal Department staff in preparation of Metropolitan's claim. A related antitrust action against Sempra Energy is set for trial early next year.

c. State Water Resources Control Board Review of the Bay-Delta Water Quality Control Plan

The State Water Resources Control Board (SWRCB) began proceedings to review the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay/Delta WQCP) with two days of public workshop hearings on October 27 and 28, 2004. Additional hearing dates are scheduled in November 2004 and January and February 2005.

SWRCB has adopted a series Bay/Delta WQCPs pursuant to California's Porter-Cologne Water Quality Control Act and the Federal Clean Water Act. The current Bay/Delta WQCP establishes a number of water quality objectives, flow requirements and operational limitations to protect beneficial uses of the Bay/Delta Estuary. Both the state and federal statutes require that water quality control plans be periodically reviewed, but do not necessarily require amendment unless amendment is justified by new information or circumstances. Under the Clean Water Act, the United States Environmental Protection Agency (EPA) has authority to review SWRCB's actions with respect to some of the requirements in the Bay/Delta WQCP, and at least portions of an amended plan ultimately may be submitted to EPA.

When this round of workshop hearings are completed, SWRCB staff potentially will prepare proposed amendments, which will trigger a second round of hearings. After those hearings SWRCB will determine whether to adopt any proposed amendments.

SWRCB's Water Rights Decision D-1641 requires the State Water Project and Central Valley Project to operate so as to meet most of the requirements of the Bay/Delta WQCP. Because of the potential impact of any revisions in the Bay/Delta WQCP on State Water Project operations, Metropolitan and other State Water Contractors are participating in the workshop hearings, in coordination with the Department of Water Resources and in cooperation with Central Valley Project contractors.

4. Finances

Legal and Finance staff closed the sale of \$68,345,000 Waterworks General Obligation Refunding Bonds on October 14, 2004. The refunding bond issue was prepared and sold on a short timeline when the bond market presented the opportunity for debt service savings. A \$300 million water revenue bond issue to fund capital improvements and water revenue refunding bonds to refinance about \$125 million in outstanding water revenue bonds will close in November. Legal staff helped to address questions from board members on Metropolitan's Official Statement and arranged for a presentation on directors' obligations with respect to securities disclosure documents at the October Budget, Finance and Investment Committee meeting. Arto Becker of Hawkins, Delafield and Wood LLP, one of Metropolitan's bond counsel firms, made the presentation.

5. Administrative Matters

Member Agency Legal Counsel Dinner - On Monday, November 8, 2004, Professor Carole Goldberg of the UCLA School of Law, will speak on "Gaining or Losing Ground? Private Development on Sites of Cultural Significance to Native Peoples." Professor Goldberg teaches Civil Procedure, Federal Indian Law, Tribal Legal Systems, and the Tribal Legal Development Clinic. She directs the Joint Degree Program in Law and American Indian Studies and is the Faculty Advisory Committee Chair of the Law School's Native Nations Law and Policy Center. In addition, Professor Goldberg has written widely on the subject of federal Indian law and tribal law, and is co-editor and co-author of *Felix Cohen's Handbook of Federal Indian Law* (1982). The event will begin with a mixer at 5:30 p.m., followed by dinner and speaker at 6:30 p.m. Senior Congressional staffers from the Senate Energy and Natural Resources Committee, Representative John Doolittle's office, and Senate Environment and Public Works Subcommittee on Fisheries, Wildlife and Water will be joining us.