

• General Counsel's January 2005 Activity Report

Summary

This report discusses significant matters in which the Legal Department was involved during the month of January 2005.

Attachments

None.

Detailed Report

1. Litigation/Claims To Which Metropolitan Is A Party

a. California Farm Bureau v. State of California

Last April, the California Farm Bureau Federation brought a CEQA challenge against California Department of Water Resources' (DWR) certification and approval of an Environmental Impact Report (EIR) for the Environmental Water Account (EWA). The EWA helps protect at-risk native fish species through changes in Bay-Delta operations, mainly by limiting pumping from the Delta at certain times of the year. The EWA simultaneously improves water supply reliability by providing the supplies that would otherwise have been lost due to the reduced pumping and other actions. In addition to improving the reliability of Metropolitan's Bay-Delta supplies, Metropolitan directly benefits from the EWA through asset acquisition agreements with DWR, such as the source shift agreement under consideration by the Board this month.

In the fall, Metropolitan and the State Water Contractors began coordinating efforts to intervene in the case to protect their interests in a functioning EWA. Last month, the Farm Bureau agreed to stipulate to intervention by Metropolitan and the State Water Contractors, thus avoiding briefing and argument on the issue. Briefing on the merits is scheduled to occur over the summer with a hearing set for October 2005.

b. Electric Industry Restructuring

Enron

On January 31, 2005, Metropolitan filed testimony at the Federal Energy Regulatory Commission in the proceeding established to consider appropriate remedies for Enron's market manipulation. Metropolitan's testimony recommends that FERC retroactively revoke Enron's ability to make charges based on market rates. If FERC adopts Metropolitan's recommendation, Enron's outstanding claim against Metropolitan in bankruptcy court, approximately \$1.5 million, would be substantially reduced. Metropolitan is working jointly with other parties who are submitting detailed expert witness testimony addressing Enron's misconduct. The hearing is scheduled for June 2005.

California ISO/PX Refund Proceeding

This matter involves legal challenges to rulings by the Federal Energy Regulatory Commission (FERC) with regards to handling of the California Independent System Operator and the California Power Exchange refund proceedings arising out of the 2000-2001 energy crisis.

Metropolitan and the State Water Contractors submitted briefs in December 2004, arguing that FERC did not have authority to order public power entities to provide refunds. Reply briefs are due in March, with oral arguments scheduled for April 2005.

c. QSA Related Litigation

On January 28 a hearing was held in Sacramento Superior Court on a second round of pleading challenges in the coordinated cases involving the Quantification Settlement Agreement (QSA) and its related agreements. Judge Candee sustained demurrers Metropolitan filed and argued on two amended petitions of the County of Imperial that seek to overturn the Imperial Irrigation District (IID)- San Diego County Water Authority (SDCWA) transfer agreement and the State Water Resources Control Board approval of the transfer. Judge Candee also sustained two other demurrers joined in by Metropolitan that were filed against Imperial Group pleadings, which allege, among other things, that the QSA and water transfer agreements violate CEQA and farmers' water rights. The Court's rulings dismiss two cases entirely and the CEQA causes of action from a third. The Court also transferred to Sacramento an Imperial Group challenge to IID's purchase of the Western Farms property that had previously remained in Imperial County. With the dismissals and the new add-on case, there are now eight cases in the coordinated proceedings.

d. Claims of O'Dea v. Metropolitan (Las Posas Feeder)

From November 5, 2004 Metropolitan has received approximately 45 government tort claims from a single attorney on behalf of claimants in Moorpark, California. All these claims assert damages to claimants' respective properties due to the construction by Calleguas Municipal Water District of the Las Posas Feeder in Ventura County. Similar claims have been made against Calleguas MWD, the County of Ventura, City of Thousand Oaks, City of Moorpark and the State of California. While Metropolitan has certain rights in the Las Posas Basin, the subject pipeline was neither financed or constructed by Metropolitan. Metropolitan has denied these claims, stating that Metropolitan did not finance or construct this pipeline. Staff will take necessary steps are being taken to protect Metropolitan's interests while cooperating fully with the named public entities.

e. Holy Hill Community Church v. Kim, Simi Valley Shopping Center, et al./Simi Valley Shopping Center v. Holy Hill Community Church and Metropolitan

On January 7, 2005, Metropolitan filed a demurrer, scheduled for hearing on February 7, to the cross-complaint of Simi Valley Shopping Center. The cross-complaint in this case seeks a judicial determination that the Shopping Center has the right to use 100 parking spaces in Metropolitan's parking structure adjacent to the former Metropolitan headquarter on Sunset Boulevard. The structure was sold along with the headquarters building in 1995 to Holy Hill Community Church. In 1997 the Church defaulted under Metropolitan's seller financing and conveyed the parking structure back to Metropolitan. In 2001 the Church sold the seven-story office tower portion to defendant Kim, who subsequently sold it in 2002 to the Shopping Center. In its cross-complaint, the Shopping Center asserts rights in the parking structure as a result of a 1969 covenant recorded at the time the office tower was permitted. Metropolitan's view is that the dispute is between the other parties and the action against Metropolitan is premature.

2. Other Matters Involving Metropolitan

a. Expansion of Sacramento Regional Wastewater Treatment Plant

Last summer the Sacramento Regional County Sanitation District approved a long-term expansion plan for the Sacramento Regional Wastewater Treatment Plant and certified an Environmental Impact Report (EIR) for the project. The expansion will increase plant discharges to the Sacramento River by about 40 percent by the year 2020. Of particular concern to Metropolitan are increased levels of TOC (total organic carbon), nutrients and pathogens. Over Metropolitan's and many other urban agencies' protestations, the EIR concluded that water quality impacts were "less-than-significant" and no mitigation was required. Following project approval and EIR certification, Metropolitan's Board authorized staff to coordinate with other urban water agencies in pursuing options to protect our water quality interests, including challenging the EIR if necessary.

Instead of filing suit, Metropolitan along with the State Water Contractors and several other urban agencies were able to enter into an agreement with Sacramento Regional CSD to explore the possibility of jointly developing and funding a feasibility study to examine measures for offsetting the increased loads. This agreement also tolled the statute of limitations for challenging the EIR to January 31, 2005. Since then the parties have completed a workplan for the joint study and agreed to share costs of the study as well as principles for funding projects that may be agreed to in the future. Last month, the parties executed agreements to fund and implement the joint study and to extend the tolling agreement to June 2005.

3. Other Matters Not Involving Metropolitan

a. Central Delta Water Agency, et al. v. State Water Resources Control Board

The State Water Resources Control Board (SWRCB) and Delta Wetlands Properties have petitioned the California Supreme Court to review the Third District Court of Appeal decision invalidating SWRCB's issuance of an appropriative water rights permit to Delta Wetlands. The permit would have allowed Delta Wetlands to divert to, and store water on, two Delta islands for subsequent sale to currently unidentified buyers. The petition for review was supported in letters to the Supreme Court by many water supply entities—including Metropolitan, the Department of Water Resources, the State Water Contractors and the Association of California Water Agencies—and business organizations such as the California Building Industry Association and California Chamber of Commerce. Metropolitan supported the petition because of language in the Court of Appeal opinion that requires an applicant to the SWRCB to "specify the actual uses, amounts and places of use of the water." Taken literally, this language might require wholesale suppliers like Metropolitan to identify actual users and amounts at the retail level in order to get SWRCB approval for water transfers or potential new water rights, a burden that cannot practically be met.

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

Respondents El Dorado Irrigation District and El Dorado County Water Agency have filed their Respondent's Briefs with the California Court of Appeal. This case is on appeal from the trial court's order to the SWRCB to delete its "Term 91" from Respondents' water rights permits. 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.

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

The State Water Resources Control Board held four additional days of hearings in its proceeding to review the 1995 Bay-Delta Water Quality Control Plan. The hearings focused on salinity, potential bromide and total organic carbon objectives, "X2" (Delta outflow) requirements, export limitations and Sacramento River and San Joaquin River flow requirements. Metropolitan is participating in the hearings as part of the State Water Contractors. Additional hearings are scheduled for March 2005.

4. Administrative Matters

On February 7, 2005, former Solicitor of the United States Department of the Interior John Leshy will speak at a Member Agency Legal Counsel Dinner on "Some Thoughts on Water Rights, Takings, Groundwater and the Federal Role in Water Policy." Professor Leshy presently teaches property, constitutional law, Indian law, and various natural resources courses at the University of California Hastings College of the Law in San Francisco. He has also served in the Civil Rights Division of the U.S. Department of Justice. Leshy is the co-author of one of the leading casebooks on water law and the standard federal public land and resources law casebook. The mixer will begin at 5:30 p.m., and dinner will follow at 6:30 p.m. Please contact Grace Yenko at 213-217-6322 if you wish to attend this event.