

- General Counsel's May 2006 Activity Report

## Summary

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This report discusses significant matters in which the Legal Department was involved during the month of May 2006.

## Attachments

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None.

## Detailed Report

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### 1. Litigation/Claims To Which Metropolitan Is A Party

#### a. *Louis H. Cardenas v. Metropolitan* (Court of Appeal)

In an unpublished decision dated May 30, 2006, the California Court of Appeal, Second Appellate District, affirmed the trial court's judgment in favor of Metropolitan, and against plaintiff Louis H. Cardenas, in virtually every respect. The plaintiff had filed a complaint on July 11, 2003 for: (1) discrimination based upon race and national origin; (2) harassment based upon race and national origin; (3) failure to prevent harassment and discrimination; (4) retaliation; and (5) aiding and abetting acts of discrimination and harassment. A year later Judge Hayley Fromholtz granted Metropolitan's motion for summary judgment. The court ruled that the causes of action for discrimination and aiding and abetting unlawful conduct failed because Cardenas did not present any evidence showing that Metropolitan discriminated against him as a Hispanic. The remaining causes of action were dismissed due to untimeliness.

Although Cardenas can petition for California Supreme Court review, it is unlikely the Supreme Court will grant it. As the prevailing party, Metropolitan will pursue all costs and fees.

#### c. *John Gonda v. Metropolitan et al.*; consolidated with *Plaks v. Metropolitan, et al.*

Calleguas, Metropolitan and other entities were sued in connection with alleged impacts from the construction of the Las Posas Feeder pipeline, which is part of Calleguas' Las Posas Aquifer Storage and Recovery Project. According to the agreement between Metropolitan and Calleguas for this project, Metropolitan is entitled to a defense of the lawsuit, as well as full indemnity. On February 27, 2006, Calleguas, via its insurance agency, the Association of California Water Agencies Joint Powers Insurance Authority (ACWA JPIA), agreed to accept the tender of the defense/indemnity. Having filed the initial pleading, Metropolitan remains co-counsel of record, although Calleguas and other defendants are taking the lead in this litigation. On May 26, 2006, Judge Steven Hintz granted Metropolitan's demurrer as to all 19 of plaintiffs' causes of action. Plaintiffs now have 30 days to amend their first amended complaint.

### 2. Other Matters Involving Metropolitan

#### a. FERC Relicensing of the Oroville Facilities

As previously reported, a proposed Settlement Agreement was submitted to the Federal Energy Regulatory Commission (FERC) on March 26, 2006, which contains the settling parties' recommended terms and conditions for the new license. Although the Settlement Agreement

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was signed by over 50 stakeholders and has widespread support, certain parties have asserted that it does not fully address their concerns. These parties have intervened in the FERC relicensing proceeding, and are seeking conditions in addition to or different from those recommended under the Settlement Agreement.

On May 26, 2006, Metropolitan and the State Water Contractors submitted a joint Reply to FERC, which responds to various issues and concerns raised in the Interventions filed by other parties. Much of this Reply focused on the assertions made by Butte County that construction and operation of the Oroville Facilities have had and are having an adverse socioeconomic impact on the county and its residents. However, our Reply also addressed a host of issues raised by other Interveners, including issues related to cultural resources, trail usage, agricultural water temperatures and flood control. Legal staff was heavily involved in drafting the Reply brief (over 90 pages in length), and in coordinating the development and preparation of technical information and exhibits submitted as part of the brief.

Metropolitan and other State Water Contractors have been and will continue working closely with the Department of Water Resources to promote our mutual interests in obtaining a license consistent with the proposed Settlement Agreement. The next step is for FERC to assess the potential environmental impacts associated with issuance of a new license for the Oroville Facilities. A draft Environmental Impact Statement (EIS) is scheduled to be released in August 2006. Metropolitan will provide comments on the EIS, as appropriate, and will continue to be actively involved in the relicensing process.

### b. State Water Resources Control Board Cases

The California Supreme Court denied several petitions to review the Third District Court of Appeal's opinion in this case, known as the "Robie Decision," on May 17, 2006. The State Water Contractors, who participated in the litigation in support of D-1641, filed briefs in opposition to the petitions for review. The denial terminates judicial review of D-1641, which will now be returned to SWRCB for further administrative proceedings consistent with the Court of Appeal opinion.

The State Water Contractors have intervened in *Pacific Coast Federation of Fisherman's Associations v. Gutierrez*, which challenges National Marine Fisheries Service's Biological Opinion regarding Central Valley Project and State Water Project operations. Plaintiffs initially opposed the intervention, but eventually stipulated to intervention after the Ninth Circuit Court of Appeal allowed the State Water Contractors to intervene in the related *Natural Resources Defense Council v. Gale Norton, U.S. Department of the Interior*. The State Water Contractors will participate in support of the Biological Opinion.

## 3. Matters of Interest Not Involving Metropolitan

### a. *S.D. Warren Co. v. Maine Board of Environmental Protection et al.* (U.S. Supreme Court)

The U.S. Supreme Court recently found that water released from hydroelectric dams potentially constitutes a "discharge" under §401 of the federal Clean Water Act (CWA) and that dam operators must therefore seek state approval of "any activity" that may result in a discharge into waters of the U.S.

Justice David Souter, author of the Court's decision, wrote, "The issue in this case is whether operating a dam to produce hydroelectricity 'may result in any discharge into the navigable

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waters' of the United States. If so, a federal license under §401 of the Clean Water Act requires state certification that water protection laws will not be violated. We hold that a dam does raise a potential for a discharge, and state approval is needed.”

While the opinion is a victory for maintaining a state's ability to control and influence hydroelectric projects, it does raise the possibility of conflicting environmental requirements for dam operators who now face both federal and state environmental regulation of the same facility.

Much of the decision focused on the definition of “discharge” under §401. The Western Urban Water Coalition, with Metropolitan's support, filed an amicus brief urging the Court to distinguish between the definition of “discharge” as found in §401 (state certification for water quality) and §402 (NPDES permit system) of the CWA. Applying the broader definition of discharge found in §401 to §402 permits for discharges of a pollutant to the waters of the U.S. could present operational problems for water agencies, such as Metropolitan, that are required to move large amounts of water from one location to another where water quality varies between the two locations.

### **4. Finances**

Legal staff worked with Finance staff and outside bond counsel to prepare and negotiate documents for \$74,140,000 Water Revenue Refunding Bonds, 2006 Series A-1 and A-2 issued on May 25, 2006.

### **5. Administrative**

Peter von Haam rejoined the Legal Department on May 8, filling a vacant attorney position. Since leaving Metropolitan in 2001, Mr. von Haam was employed at the California Department of Justice as a Deputy Attorney General in the Natural Resources Law Section, where he represented state agencies responsible for managing California's natural resources. We are pleased to have Mr. von Haam return to Metropolitan.