MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Report

Legal Department

- **General Counsel's September 2006 Activity Report**

Summary

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

Attachments

None.

Detailed Report

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

a. *Alameda County Flood Control & Water Conservation District, Zone 7, et al. v. California Department of Water Resources*

This litigation was filed by fourteen State Water Project contractors against the Department of Water Resources (DWR), challenging the manner in which it allocates certain energy costs and revenues under the State Water Contract. As previously reported, the plaintiffs filed a motion seeking to amend their complaint to (1) add Littlerock Creek Irrigation District and Ventura County Flood Control District as parties to this litigation, and (2) assert additional claims against the DWR and against Metropolitan and its Southern Coalition partners (Intervenors). The rules for amending complaints are very liberal and are geared toward allowing additional claims to be asserted, particularly during the early stages of the litigation. Thus, as anticipated, the court granted the plaintiffs' motion. DWR and the Intervenors' responses will be due approximately thirty days after Littlerock Creek and Ventura County have been served with the amended complaint. Intervenors anticipate moving to have the amended complaint dismissed on various grounds.

As also reported, DWR filed a motion seeking to have this case litigated in two phases (i.e., bifurcated), with the issue of liability tried first and, if necessary, the issue of damages tried second. The Intervenors joined in this motion. On September 29, the court issued a tentative ruling on this motion in which it agreed to bifurcate the trial, but not discovery. Nonetheless, the court emphasized that the parties were free to file motions seeking to limit the nature and scope of any specific discovery request, and that it would consider on a case-by-case basis whether the discovery of any particular type of evidence should be delayed. The court will issue its final ruling after the hearing on this motion, which is scheduled for October 13, 2006.

b. *Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (California Supreme Court)

September 29 was the deadline for parties to file answers to "friend of the court" briefs filed in the California Supreme Court's review of the Court of Appeal decision invalidating the Environmental Impact Report (EIR) for the CALFED Bay-Delta Program. Metropolitan, as a party defending the adequacy of the EIR, filed an answer to a brief by the Planning and Conservation League and others, which argued in support of the Court of Appeal's decision that the CALFED EIR should have considered an alternative that reduced the amount of water exported from the Delta to Southern California. Briefing of this case is now closed. The court

will set oral argument after allowing sufficient time to consider the matter, which in this case may be many months. The Court of Appeal decision and all of the legal briefs filed to date can be viewed at http://www.mwdh2o.com/DocSvcsPubs/bdeir/index.html.

c. *Protect Our Water and Environmental Rights v. Imperial Irrigation District*

Protect Our Water and Environmental Rights (POWER), and an Imperial County landowner, James Abatti, have filed two new lawsuits -- one in federal court in Sacramento and the other in Imperial County Superior Court -- challenging the All-American Canal (AAC) Lining Project. Both lawsuits contend that IID violated the California Environmental Quality Act (CEQA) by issuing an Environmental Impact Report (EIR) addendum in July 2006 instead of a supplemental or subsequent EIR. Both suits name the San Diego County Water Authority, Metropolitan and the U.S. Bureau of Reclamation as Real Parties in Interest.

These two new lawsuits differ only slightly from the earlier POWER lawsuit that was recently dismissed by the San Francisco Superior Court. The new lawsuits challenge IID's July 2006 decision to adopt an EIR addendum whereas the earlier POWER lawsuit challenged IID's January 2006 decision to enter into financing and construction agreements for the AAC Lining Project. All of the POWER lawsuits, however, allege the same underlying legal theory which is that new information and changes in circumstances have made the old EIR outdated, and therefore, IID must prepare a subsequent or supplemental EIR for the project. Metropolitan and other parties expect to file various motions regarding transfer and dismissal of these new lawsuits.

2. Other Matters Involving Metropolitan

a. Imminent Litigation Against the Department of Water Resources Under the California Endangered Species Act

The Watershed Enforcers project of the California Sportsfishing Alliance has notified the Department of Water Resources that it will file a complaint against DWR during the week of October 1, 2006 under the California Endangered Species Act (CESA). Based on an earlier letter plaintiffs sent to DWR in March 2006, the complaint will allege that the State Water Project is "taking" the delta smelt without authorization under CESA. Plaintiffs apparently will move the court on October 6, 2006 to set a hearing to determine whether the court should issue a preliminary order against DWR further restricting pumping as necessary to protect the smelt pending a trial on the merits. Metropolitan staff is discussing this imminent case with DWR and other State Water Contractors' staff to determine how best the State Water Contractors can assist DWR in the litigation.

b. State Water Resources Control Board Proceeding to Amend the 1995 Bay-Delta Water Quality Control Plan

The State Water Resources Control Board (State Board) issued a notice of public hearing to consider amending its 1995 Bay-Delta Water Quality Control Plan (Plan) on November 13 and 14, 2006. The Plan establishes several water quality objectives for salinity and dissolved oxygen as well as flow requirements to protect various beneficial uses of Bay-Delta water. Under California's Porter-Cologne Water Quality Act and the federal Clean Water Act, the State Board is required to periodically review the Plan. Previously, in 2004, the State Board held hearings to develop an evidentiary record for potential amendment of the objectives. In addition, the recent Robie Opinion in the *State Water Resources Control Board Cases* directed the State Board to

review two particular objectives. The November hearings will be based on the 2004 record as supplemented by comments and recommendations made at the hearings. The State Water Contractors participated in the 2004 hearings and are preparing to present comments and recommendations at the November hearings.

c. *City of Claremont POA v. City of Claremont*

The California Supreme Court has issued its unanimous opinion in the *City of Claremont* case, involving the scope of a public agency's duty to meet and confer with its employees. Metropolitan submitted an amicus brief in support of management that was specifically referenced in the opinion (at page 10). In reaching its decision, the court relied on an earlier 1986 precedent, *Building Material and Construction Teamster's Union v. Farrell* (41 Cal.3d 651). Applying the *Building Material* three-part test, the court determined that there is no duty to meet and confer with regard to a management action that lacks a significant and adverse effect on wages, hours, or working conditions. If an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on wages, hours, or working condition, the action is within the scope of representation only if the employer's need for unencumbered decision-making in managing its operation is outweighed by the benefit to employer-employee relations of bargaining about the action in question.

The opinion is disappointing for only applying the *Building Material* test. Metropolitan submitted its amicus brief because the *Building Material* balancing has proven difficult to apply, and hoped that the court would take the invitation of the amici to clarify the application of the *Building Material* test.

The most significant aspect of the opinion applying the balancing test was the statement made for the first time that a court may also consider whether the transactional cost of the bargaining process outweighs its value. As applied to Metropolitan this last element of the opinion, the "transactional costs of the bargaining process" may allow Metropolitan to better marshal its resources in upcoming relations with Metropolitan's bargaining units.

The Supreme Court opinion may be viewed at http://www.metnews.com/sos.cgi?0806%2FS120546.

d. *Defenders of Wildlife v. United States Environmental Protection Agency*

In this case, the Ninth Circuit ruled that the duty of federal agencies to avoid jeopardy to species in the Endangered Species Act (ESA) takes precedence over the duties imposed on federal agencies under other federal statutes. This issue of whether and to what extent the ESA "trumps" other federal statutes is a difficult issue upon which federal courts have differed. The question is, should contracted and committed water be withheld or modified to provide for endangered species, even when another federal statute precludes the taking? The Ninth Circuit says yes.

The National Association of Home Builders (NAHB) has petitioned the Supreme Court to review the *Defenders of Wildlife* decision. Metropolitan plans to join with other water users in filing an amicus brief urging the Supreme Court to grant NAHB's petition and review the *Defenders* decision.

Because of the importance of the issue to Metropolitan, we engaged former General Counsel Rod Walston to encourage federal officials to petition the U.S. Supreme Court to review the Ninth Circuit's decision in *Defenders of Wildlife*. Mr. Walston discussed the *Defenders of Wildlife* case with the Deputy Solicitor General in the U.S. Department of Justice, and sent a lengthy follow-up letter urging the United States to seek Supreme Court review. The Solicitor

General's office in the Department of Justice is charged with representing the United States before the Supreme Court, and will make the decision whether to petition the Supreme Court to review the Ninth Circuit's decision. If the United States also petitions for review, it will significantly increase the likelihood that the Supreme Court will take up the *Defenders* case.

3. Matters of Interest Not Involving Metropolitan

a. *El Dorado Irrigation District v. State Water Resources Control Board*

The Third District Court of Appeal affirmed the trial court's decision in this case on September 8, 2006. As a result, the State Water Resources Control Board's "Term 91" will not be imposed on El Dorado Irrigation District's (El Dorado) water rights permits. In the course of the opinion, however, the court explained a number of principles of California water law that should be beneficial to the state and federal export projects and their contractors in the future.

The State Board's Term 91, which has been imposed in all water rights permits issued since 1965, prohibits the permit holder from diverting water at times when natural flow is not available for diversion, thus protecting storage releases made by the State Water Project and Central Valley Project to meet Delta objectives, senior in-basin needs or contract deliveries. The El Dorado opinion does not limit the State Board's authority to continue imposing and enforcing Term 91 generally.

However, El Dorado's case is different because its water right application is based on a so-called assigned state filing under the County of Origin law. Under that law, a number of water rights filings made by the State beginning in 1927 were assigned to entities such as El Dorado, and those filings have a water rights priority date of 1927 no matter when they are eventually perfected. For example, El Dorado's priority date is 1927 even though its right was not perfected until 2001. The State Board imposed Term 91 on El Dorado as it has on all rights issued since 1965. The result is that while El Dorado's relatively early 1927 right is subject to the term, water rights issued after 1927 but before 1965 that are deemed junior to El Dorado do not have to comply with Term 91. The court held that this requires El Dorado to cease diversions while users junior to it are allowed to continue their diversions in violation of El Dorado's priority right vis-à-vis those junior users.

For this fairly narrow reason, the Court of Appeal agreed that the State Board could not impose Term 91 on El Dorado in this case. The State Water Contractors are evaluating whether there are other entities with state-assigned rights similar to El Dorado to determine the potential impact of the opinion on State Water Project water rights. On the other hand, the opinion made a number of clear statements of California law that will be beneficial to export project operations in the future, including:

- The State Board does have the authority to impose and enforce Term 91 on upstream users in most situations and should do so;
- Water rights priority applies only to natural flow and no user has the right to divert water stored by the projects for their use without a contract to do so;
- A water user can be prohibited from diverting project-stored water even if Term 91 is not contained in its water right;
- It is appropriate for the State Board to require upstream diverters to reduce diversions to help meet Delta objectives.

Staff, along with other state water contractors and DWR, continues to evaluate the opinion and ramifications to other water users and proceedings.

b. *Natural Resources Defense Council v. Rodgers*

In 1988 the Natural Resources Defense Council sued the United States Bureau of Reclamation (USBR) alleging that the Bureau's renewal of contracts for water from the Friant project did not comply with the National Environmental Policy Act, Endangered Species Act and California Water Code. Plaintiffs have been successful in a number of preliminary rulings. A trial on the ultimate issue of the Friant project's liability for restoring flow to the San Joaquin River, primarily to restore salmon, is scheduled for February 2007. However, the parties signed and filed with the trial court a Stipulation of Settlement on September 23, 2006. A significant condition precedent to the settlement becoming effective is the enactment of legislation proposed by the settling parties facilitating implementation of the settlement by December 31, 2006. Staff is reviewing the proposed legislation and settlement to determine whether there are any potential adverse impacts to State Water Project operations or supply. The settlement is described in detail in the General Manager's Board Letter 9-5, dated October 10, 2006.

4. Finances

The Legal Department worked with the Finance Department and outside bond counsel to prepare the Preliminary Official Statement for Metropolitan's proposed Water Revenue Refunding Bonds, 2006 Series B. The Preliminary Official Statement provides information about Metropolitan and the proposed bonds to prospective bond purchasers. After pricing the bonds and finalizing the terms, anticipated in early October, we will include the pricing information in the final Official Statement and assist with the bond closing. The Preliminary Official Statement will be examined by the Budget, Finance, Investment and Insurance Committee in the disclosure workshop scheduled for the October committee meeting.