

## • General Counsel's October 2006 Activity Report

### Summary

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

### Detailed Report

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#### 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 (Hyatt-Thermalito)*

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. DWR, Metropolitan and other contractors who intervened in the litigation in support of DWR had advocated for a reasonable discovery period commensurate with the complexity of this action (one year for liability phase) and a trial on liability for April 2008. However, at a case management conference on October 27, 2006, the court expressed that it wanted to fast-track the litigation. It appears that the court will set a very aggressive schedule for the parties. To that end, we are commencing discovery.

b. *United States v. Fallbrook Public Utility District*

This litigation commenced in the 1960s to adjudicate water rights in the Santa Margarita basin. Metropolitan is a party to the litigation due in part to the operation of Lake Skinner and Diamond Valley Lake, which operate under two court-approved agreements. In October, both the Cahuilla Band of Indians and the Ramona Band of Cahuilla Indians filed motions to intervene in the case in U.S. District Court for the Southern District of California to quantify their federal reserved water rights. This motion arises in the context of increased demands in the Temecula area and proposals to bring imported water supplies into the region. For several years, Metropolitan has been a member of the Watermaster's Steering Committee for the adjudication. Metropolitan will monitor this litigation closely, particular with regard to potential effects on reservoir operations and new demands for imported water supplies.

c. *Daffin v. J. F. Shea Construction, Inc., et al.*

On October 17, 2006, Metropolitan was served with a Summons and Complaint in the case of *Daffin v. J. F. Shea Construction, Inc., et al.* The plaintiff, Laron Daffin, alleges substantial personal injuries arising from a single-motorcycle accident at Anza Road in Riverside County. At the time of the accident, Metropolitan's construction contractor J. F. Shea was working on the San Diego Pipeline No. 6 project and had altered the roadway to accommodate construction. Daffin alleges that the relocated road was defective and constituted a dangerous condition of property.

When Metropolitan received the plaintiff's claim filed pursuant to the Government Code, which is a mandatory prerequisite to such a lawsuit, we tendered defense and indemnity of the case to J. F. Shea's insurance carrier. Metropolitan was named as an additional insured on the policy,

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pursuant to the general conditions of the construction contract. Metropolitan has forwarded the complaint and summons to the carrier.

### **2. Other Matters Involving Metropolitan**

#### a. *Watershed Enforcers, a project of California Sportfishing Protection Alliance v. DWR*

This case was filed in the Alameda County Superior Court on October 5, 2006, alleging that DWR's operation of the SWP export facilities is "taking" listed species in violation of the California Endangered Species Act (CESA). CESA generally prohibits the take of listed species without an incidental take authorization from California Department of Fish and Game (DFG). The trial court denied plaintiff's request for a temporary restraining order on October 6, 2006 and scheduled a hearing date for plaintiff's request for a preliminary injunction on November 16, 2006. The request for injunction asks the court to order DWR to stop operating SWP export facilities in a manner that takes listed fish or to obtain a formal take authorization from DFG. DWR asserts that it has a "grandfathered" take authorization under Fish & Game Code. The State Water Contractors have successfully intervened in support of DWR. The State Water Contractors and DWR filed their pleadings opposing plaintiff's request for preliminary injunction on October 30, 2006.

As reported over the last several months, DWR, the state and federal export contractors, the USBR, DFG and the federal fishery agencies are developing the Bay-Delta Conservation Plan. The Bay-Delta Conservation Plan is intended to be a comprehensive program to protect state and federally listed species with respect to water operations in the Delta and to be the basis for formal incidental take authorization under CESA and the Federal ESA. In essence, DWR already is pursuing the incidental take authorization that plaintiff seeks to impose through the court.

#### b. Colorado River Shortage-Sharing Guidelines

The U.S. Bureau of Reclamation is in the process of adopting guidelines for sharing of Colorado River shortages among the Lower Division states (California, Arizona, and Nevada). The Legal Department is providing advice to management on interpretation of the Law of the River as it relates to declared shortages, including allocations of shortages among the Lower Division States, between the Upper and Lower Basins, and under the treaty with Mexico.

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

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 for the Oroville facilities. Although the Settlement Agreement has widespread support, certain parties have asserted that it does not adequately address their concerns and are seeking more onerous license conditions. Metropolitan and other State Water Contractors strongly believe that the Settlement Agreement fairly and equitably balances the competing interests of the various stakeholders involved in this process, and have been working closely with DWR to preserve and promote this agreement.

On September 29, 2006, FERC issued its Draft Environmental Impact Statement (DEIS) for the new license. It identifies the proposed Settlement Agreement as the preferred alternative for this project, with only a few minor modifications. Accordingly, FERC staff are recommending that the full Commission adopt the proposed Settlement Agreement as the terms and conditions for

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the new license. Notably, FERC staff rejected the arguments made by Butte County regarding the project's alleged socioeconomic impacts and denied its demands for monetary and non-monetary compensation.

A public hearing on the DEIS is scheduled for November 8, 2006; written comments are due no later than November 28. Metropolitan plans to attend the public hearing and will submit oral and written comments on the DEIS as appropriate.

### d. CAISO Market Redesign

On October 23 Metropolitan staff filed reply comments to the 400+ page order issued by FERC last month. The order conditionally accepts the California Independent System Operator's (CAISO) proposal for a revised market design tentatively scheduled to take effect in November 2007.

Metropolitan has worked with staff from the State Water Project and the CAISO for several years to identify and ameliorate potentially problematic market redesign features. Metropolitan and SWP were largely successful in achieving that goal. Among other things, FERC directed the CAISO to recognize Metropolitan's rights to use its 230 kV transmission line to serve the Colorado River Aqueduct and holds MWD harmless from certain charges associated with such use. In addition, FERC directed the CAISO to work with SWP in enhancing SWP's ability to provide demand response, which not only benefits grid users by enhancing energy supply, but also supplements SWP power revenue. Metropolitan will continue to review and participate in revised market design meetings as the CAISO continues to refine and detail its redesign prior to implementation.

### e. Litigation Regarding State Water Resources Control Board Cease and Desist Order

The State Water Resources Control Board's (SWRCB) Executive Director issued a letter to DWR on October 13, 2006 explaining SWRCB's interpretation of the Cease and Desist Order (CDO) issued against DWR and the U. S. Bureau of Reclamation (USBR) in February 2006. The CDO found that DWR and USBR were threatening to violate a salinity objective protecting agriculture in the south Delta. USBR, the State Water Contractors and federal Central Valley Project contractors sued SWRCB in state and federal court because the CDO appears to require the State Water Project and Central Valley Project to ensure that the objective is met, irrespective of whether they cause an exceedance or can control the cause of the exceedance, in violation of SWRCB Decision 1641. However, the SWRCB Executive Director's letter clarifies that the CDO did not make any change to the projects' existing obligations under D-1641; that the Executive Director will not recommend any enforcement action against the projects, and anticipates that SWRCB would not take any action, for exceedances caused by actions beyond the projects' control; and that if the projects are a cause for an exceedance, any enforcement action would be based only on the projects' relative responsibility. Based on this letter the project contractors, USBR and DWR are discussing a potential stay or dismissal of the pending litigation.

### f. SWRCB Proceeding to Review the South Delta Agricultural Salinity Objective in 1995 Bay-Delta Water Quality Control Plan

On October 13, 2006 the SWRCB issued a notice of public workshop to be held on January 16 and 19, 2007, to review the salinity objective for south Delta agriculture in the 1995 Bay-Delta Plan. The SWRCB Executive Director's letter referred to in the item above committed SWRCB

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to review the objective, including the reasonableness of the objective, the potential causes of high salinity and alternative methods to control salinity in the south Delta. Based on information received during the workshop, SWRCB likely will develop and manage studies of salinity issues in the south Delta that may result in an amendment of the 1995 Bay-Delta Plan. Metropolitan staff is working with the State Water Contractors, in coordination with DWR, to present information at the workshop.

This workshop is separate from SWRCB's public hearing to review the entire 1995 Bay-Delta Plan, which was reported in the General Counsel's September 2006 Activity Report. That hearing will commence in mid-November, but will not consider amendment of the south Delta agriculture objective.

### **3. Matters of Interest Not Involving Metropolitan**

#### *Natural Resources Defense Council v. Rodgers*

Federal District Court Judge Lawrence Karlton approved the Stipulation of Settlement in this litigation on October 23, 2006. If successfully implemented, the settlement (described in detail in the General Manager's Board Letter 9-5, dated October 10, 2006) will end 18 years of litigation over Friant Dam's impact on San Joaquin River salmon and restoration of flows to the River.

### **4. Finances**

Legal staff participated in Metropolitan's issuance of \$45,875,000 aggregate principal amount of Water Revenue Refunding Bonds, 2006 Series B, on October 18, 2006. These bonds refinanced outstanding Water Revenue Bonds to provide debt service savings.

### **5. Administrative**

The Legal Department enhanced its existing business continuity procedures by providing key department staff with portable electronic media that contain important reference documents, information for contacting staff members and templates for several documents that will assist in resuming business functions promptly from a remote location.

Steven P. Erie, author of *Beyond Chinatown: The Metropolitan Water District, Growth, and the Environment in Southern California*, will speak at a Member Agency Legal Counsel Dinner on November 13. Mr. Erie is a professor of Political Science and Director of the Urban Studies and Planning Program at UC San Diego. The mixer will begin at 5:30 p.m., and dinner will be at 6:30 p.m.