

## • General Counsel's January 2007 Activity Report

### Summary

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This report discusses significant matters in which the Legal Department was involved during the month of January 2007.

### Attachments

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None.

### Detailed Report

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

a. Imperial Irrigation District v. All Persons (QSA Related Litigation) (Court of Appeal)

In 2005, the Sacramento Superior Court ruled that Imperial County's CEQA claims challenging the Quantification Settlement Agreement were untimely and not filed within the statute of limitations. Imperial County then asked the Court of Appeal in Sacramento to review that dismissal ruling by way of an extraordinary writ. The Court of Appeal granted the writ and agreed to review the dismissal ruling. The Court of Appeal also stayed all further proceedings in the numerous QSA cases in the Sacramento Superior Court in 2005. After a nearly two-year hiatus, the Court of Appeal finally set oral argument in the writ proceeding for March 21, 2007. We anticipate that after the Court of Appeal issues a ruling on the writ, the QSA litigation will start up again in the Sacramento Superior Court.

b. Protect Our Water and Environmental Rights (POWER) v. Imperial Irrigation District (POWER II) (Sacramento Federal District Court)

This is a lawsuit filed by an environmental organization, Protect Our Water and Environmental Rights (POWER) against the Imperial Irrigation District, Metropolitan, San Diego County Water Authority (SDCWA) and the U.S. Bureau of Reclamation in federal district court in Sacramento. The complaint alleged that IID violated the California Environmental Quality Act (CEQA) in implementing the All-American Canal Lining Project. On January 18, 2007, Federal District Judge Karlton dismissed POWER's complaint on the ground that the complaint raised only state law issues over which the federal court lacked subject matter jurisdiction. It is unknown whether POWER intends to appeal.

c. Protect Our Water and Environmental Rights (POWER) v. Imperial Irrigation District (POWER III) (Imperial County Superior Court)

This lawsuit was filed by POWER against IID, Metropolitan, SDCWA and the U.S. Bureau of Reclamation in state court in Imperial County and alleges legal claims under the California Environmental Quality Act (CEQA) that are essentially identical to those in the federal *POWER v. IID* lawsuit (POWER II). The Imperial County Superior Court ordered that this case be transferred to the San Francisco Superior Court. We were notified in January 2007 that the case has arrived and been given a case number in San Francisco, so proceedings in that court should begin soon.

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- d. *Metropolitan v. Hearing Officer Walter Daugherty (Real Party in Interest: AFSCME Local 1902)* (Los Angeles Superior Court)

On January 26, 2007, Metropolitan filed a Petition For Writ of Administrative Mandamus seeking to overturn a procedural ruling made at an appeal hearing held pursuant to the grievance process contained in the AFSCME Local 1902 MOU. The District's petition alleges that Hearing Officer Daugherty exceeded his jurisdiction and committed prejudicial error by erroneously concluding that he had jurisdiction under the MOU to review the results of a job audit. Although Metropolitan eventually prevailed on the merits of this case (i.e., the Hearing Officer declined to change the outcome of the job audit challenged by Local 1902). Mr. Daugherty's procedural ruling establishes a precedent to allow AFSCME to claim that any job audit result is subject to the grievance and appeal procedure. If such a ruling is allowed to stand, outside Hearing Officers will be viewed as having the ultimate authority to determine employee job classifications. In Management's view, a job audit grievance is limited to enforcing Human Resources' obligation to complete a job audit within one year and advise the employee of the results of the job audit. A decision is expected within the next six months.

### 2. Other Matters Involving Metropolitan

- a. *Consejo de Desarrollo Economico de Mexicali (CDEM), et al. v. United States (All American Canal Litigation)* (Nevada U.S. District Court)

This case involves a challenge to the All-American Canal (AAC) Lining Project and is currently pending in the Ninth Circuit. The Ninth Circuit previously issued an injunction staying all further work on the AAC Lining Project until the Ninth Circuit rules on the appeal. Federal legislation passed in December 2006 directed that the Secretary of the Interior implement the AAC Lining Project immediately, without further delay. In light of this legislation, the Federal Government asked the Ninth Circuit in December 2006 to lift its injunction. This request was also supported by the California water users. In January, plaintiffs filed their opposition to the motion to lift the injunction. The Ninth Circuit has not yet ruled on this matter.

- b. *California Farm Bureau Federation, et al. v. California State Water Resources Control Board* (Court of Appeal)

The Third District Court of Appeal has partially invalidated water rights fees that the State Water Resources Control Board (SWRCB) has been assessing on water rights holders under Water Code Sections 1025, 1540 and 1560. The Court agreed with the Sacramento Superior Court's determination that the fees statute is valid on its face, but found that the fees are invalid as applied.

In 2003 the California Legislature eliminated general funding for SWRCB's Division of Water Rights (Division) and directed SWRCB to develop regulations requiring water rights holders to pay user fees to fund the Division. SWRCB adopted a fee regulation requiring water rights holders with appropriative rights dating from 1914 to pay annual fees. Fees were not assessed on riparian water users and pre-1914 appropriative water rights holders (who account for about 38% of water rights) because SWRCB's authority to impose fees on them is unclear, or on the United States Bureau of Reclamation (about 22% of rights) because of its sovereign immunity. (However, the Bureau's share of fees was assessed directly on the Central Valley Project water rights contractors.) Therefore, the fees were collected only from 40% of those holding water rights.

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The Court of Appeal first held that SWRCB's annual fee is a "regulatory fee," not a tax, and is exempt from article XIII A of the California Constitution. It then found that *on its face* the fee is a valid regulatory fee because it is reasonably related to the payers' burden or benefits from the regulated activity. However, the Court then held that the fee was invalid *as applied* because it was allocated on only 40% of water rights holders; that while one-third of the Division's work is for the benefit of the general public, that work is also charged to that smaller group of water rights holders; and that the annual fee subsidized those seeking new water rights applications. The Court also held that it was improper to charge CVP contractors for the entire face amount of the Bureau's water rights because they use only a portion of those rights.

The Court remanded the case to the trial court directing it to order SWRCB to adopt a new fee regulation within 180 days and to determine the amount of annual fees improperly assessed for the 2003-2004 fiscal year. The SWRCB already has begun discussion with interested parties to develop a new fee structure. Metropolitan staff has and will continue to participate in all SWRCB processes regarding the new fee regulation and in any efforts to seek legislative resolutions to the fee issues. Metropolitan has been assessed approximately \$36,000 per year for Colorado River filings and pays its proportionate share of the fees assessed on State Water Project water rights. At this early stage, it is unclear how the fees imposed on Metropolitan and the State Water Project may be affected.

c. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (California Supreme Court)

On February 1, the California Supreme Court issued its decision in the *Vineyard* case, which concerns the adequacy of an Environmental Impact Report (EIR) for a large-scale residential and commercial development proposal east of Sacramento. At issue was whether the EIR adequately addressed the water supply required for the development. The EIR's analysis of water supplies recognized that at build-out, the project's access to water supplies was not fully assured or guaranteed because access could be limited by competition from other potential users and by other contingencies such as the fact that the contracts for future had not been fully negotiated. Both the trial and appellate courts in Sacramento upheld the EIR's water supply analysis. In its decision on the water supply issue, the Supreme Court reversed the lower courts, but did so primarily on the grounds that the EIR did not clearly explain the facts and analysis supporting its conclusion that sufficient future water supplies are likely to be available. On the issue of the level of certainty required for water supplies, the Court held that an EIR for a land development project need not demonstrate that future water supplies are certain. Rather, an EIR will satisfy CEQA if it acknowledges the uncertainty of the supply, discloses reasonably foreseeable alternative supplies, and discloses the significant environmental effects of the alternative supplies. The Court's decision also provides important clarification on the relationship between land use planning and water supply planning in California. Thus, although the Court overturned the specific EIR at issue, the decision should prove helpful in resolving issues concerning the requisite level of water planning needed to support land development plans under CEQA. Metropolitan participated in the preparation of an amicus curiae brief in this case on behalf of the Association of California Water Agencies and the State Water Contractors.

### 3. Finances

The Legal Department provided legal advice to Finance and Audit staff relating to Metropolitan's historic accounting for State Water Contract capital payments, including disclosure requirements for

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changes in accounting, and reviewed procedures for setting rates and charges for the next fiscal year.