



Metropolitan Cases

Watershed Enforcers, a project of California Sportfishing Protection Alliance v. California Department of Water Resources, et al.
(Alameda County Superior Court)

Subsequent to the trial court's determination in this case that the Department of Water Resources (DWR) does not have an appropriate "incidental take authorization" under the California Endangered Species Act (CESA) for its take of delta smelt in operation of the State Water Project (see the General Counsel's April 2007 Activity Report), the following has occurred. First, DWR filed its appeal of the trial court's order on May 7, 2007 followed by the State Water Contractors on May 21, 2007. Next, California's First District Court of Appeal confirmed that the trial court's decision in this case is stayed pending outcome of the appeals. Third, DWR withdrew its request to California Department of Fish and Game (DFG) to determine whether an existing federal take authorization (which was subsequently invalidated in *NRDC v. Kempthorne*) was consistent with the requirements of CESA. (See related report on *Watershed Enforcers II*) Finally, the plaintiffs in this case filed a motion with the Court of Appeal on May 29, 2007 requesting calendar preference for hearing the case. If the court grants the motion and plaintiffs' proposed schedule is adopted this case could be ready for the court to schedule oral argument by mid-August. When oral argument is actually scheduled will depend on the Court's current workload.

Watershed Enforcers, a project of California Sportsfishing Alliance v. Broddrick, Department of Fish and Game, et al.
(Alameda County Superior Court) (Watershed Enforcers II)

This is a second Watershed Enforcers case dealing with DWR take of delta smelt, filed in Alameda County Superior Court on May 16, 2007. As a result of the decision in *Watershed Enforcers v. DWR* discussed above, DWR had requested that California Department of Fish and Game determine whether DWR qualified for a "consistency determination" under CESA based on a federal biological opinion regarding the delta smelt. DWR withdrew its consistency

determination request. Plaintiff asserts in this case that DFG must still process the request and make the determination even though DWR has withdrawn the request and has no plans to rely on a consistency determination for take authorization. Metropolitan was granted leave to intervene in the case on May 25, 2007, as were the State Water Contractors (SWC). A hearing on Watershed Enforcers' writ petition is set for June 15 and opposition to the writ petition by DFG, DWR Metropolitan and SWC is due June 6.

Metropolitan v. Campus Crusade for Christ, Inc.
(California Supreme Court)

The last remaining eminent domain case filed by Metropolitan to acquire land for the Inland Feeder Project is also the most complex. The case involves acquisition of 28 acres of fee and easement, and 27 acres of temporary construction easements on 1,825 acres of land owned by Campus Crusade for Christ. The larger property includes areas within both Waterman and Strawberry Canyons in the San Bernardino Mountains. The property was historically used as a hotel and mountain resort, but was operated by Campus Crusade as a religious conference center.

Metropolitan commenced the eminent domain action in 1997 to acquire the rights to construct and operate the Inland Feeder pipeline and tunnels across the property. Construction of the pipeline within the property boundaries was completed in 1999, and tunnel construction is ongoing.

The complexity of the case relates to claims by Campus Crusade that the property was ripe for intensive development, but the ongoing construction has delayed the entitlement, financing and marketing of the property for development use. Campus Crusade further argued that the value of the property was permanently reduced by the threat of a rupture of the pipeline that could cause damage to the property in the event of an earthquake. Campus Crusade's appraisers estimated the total amount of these damages at \$11 million to \$14 million.

After five years of pre-trial discovery and maneuvering, the trial court granted Metropolitan's motions to exclude any evidence of such claims as



unsupported by the facts or the law. The case was finally brought to trial in 2003. Even without the presentation of evidence on these claims, the trial took one month to complete. At the conclusion of the trial, the court awarded \$478,278 as just compensation for the property interests being acquired.

Campus Crusade filed an appeal arguing that the trial court had improperly decided against its claims of damages when those issues should have been left to a jury. The appeal challenged the fundamental rules governing the procedures that apply in eminent domain cases. In December 2005, the Fourth District Court of Appeal reversed the judgment. The court decided that all issues in an eminent domain case that relate to the amount of compensation should be left to a jury to decide, and any evidence offered in support of a claim for damages that is more than mere speculation is entitled to consideration by a jury.

As last reported to the Legal and Claims Committee on September 12, 2006 in Confidential Board Letter 8-6, Metropolitan asked the California Supreme Court to review the court of appeal's decision, which runs counter to existing decisions of other appellate courts and prior rulings of the supreme court itself. The request for review was granted by unanimous vote of the court. The importance of the case to eminent domain jurisprudence is reflected by the "friend of the court" briefs filed by numerous public agencies, property rights groups and eminent domain practitioners.

The Supreme Court heard oral arguments in the case on May 29. The justices asked pointed questions of each side about the proper role of the judge and jury in eminent domain cases, and the standard of proof required to support a claim for damages to the property. A decision by the court is expected within the next several months.

There has also been significant public interest in this area of the law since the 2005 *Kelo* decision by the U. S. Supreme Court that upheld the use of eminent domain for redevelopment purposes. This public interest was reflected in a request to the court to allow the arguments in the case to be broadcast on the California Channel, a cable television channel modeled on C-SPAN and dedicated to coverage of California government. The court denied the request. Regardless of the outcome in this case, it is expected that efforts to revise the scope and procedures of eminent

domain proceedings will continue in the legislature and through ballot measures.

Alameda County Flood Control & Water Conservation District, Zone 7, et al. v. California Department of Water Resources (Hyatt-Thermalito) (Sacramento Superior Court)

This litigation was filed by fourteen State Water Project contractors against DWR, challenging the manner in which it allocates certain energy costs and revenues under the State Water Contract. In the General Counsel's Activity Report of October 2006, we reported that DWR, Metropolitan and other contractors who intervened to support DWR had advocated for a reasonable discovery period commensurate with the complexity of this action. Instead the court fast-tracked the litigation requiring immediate commencement of discovery.

Over the past several months, most of the focus has been on discovery-related activities. Among other things, legal staff assisted outside counsel in: (1) indexing and reviewing approximately 900,000 pages of documents; (2) responding to over 500 document requests and over 1800 interrogatories propounded by the Plaintiffs; and (3) preparing nearly 400 document requests and almost 800 interrogatories propounded on the Plaintiffs. Despite these large numbers, all parties anticipate producing additional documents and propounding additional requests for written discovery prior to and in preparation for the first phase of trial on liability issues.

Legal staff also assisted outside counsel in preparing two motions aimed at compelling more complete discovery responses from the Plaintiffs, both of which were successful and one of which resulted in sanctions against the Plaintiffs. A similar motion filed by Plaintiffs was largely rejected and resulted in no sanctions against the Intervenor.

Lastly, legal staff assisted in conducting informal interviews of former Metropolitan staff who may have information relevant to this case. To date, no formal depositions of any fact witnesses have been taken or scheduled. However, Plaintiffs recently provided the Intervenor with a list of persons they anticipate deposing in July and August. Legal staff is conferring with outside counsel regarding this list and whether any additional persons should be deposed as part of this first phase of the litigation. Pursuant to the Court's Case Management Order, the deadline for designating expert witnesses for



the liability phase of trial was May 1, 2007. Neither the DWR nor the Intervenor designated any experts. Plaintiffs designated one person as an expert in economics, but were not specific about the nature of his testimony. Plaintiffs have refused to make their expert available for a deposition until late July. Accordingly, both the Intervenor and DWR have moved to exclude the testimony of this expert. That motion is scheduled to be heard on June 8, 2007.

Finally, a Case Management Conference is scheduled with the Court on June 8, 2007 to discuss the status of this case. In preparation for this conference, the parties submitted a Joint Case Management Conference Statement, which outlines their respective views concerning the progress of the litigation. In that statement, the Intervenor and DWR have requested that the first phase of trial be deferred until April 21, 2008, to give the parties more time to complete discovery and to file motions for summary judgment. Plaintiffs are opposing this request.

Metropolitan v. Hearing Officer Walter Daugherty (Real Party in Interest: AFSCME Local 1902) (Los Angeles County 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. On May 2, 2007, Superior Court Judge David Yaffe issued his decision, and he declined to overturn Mr. Daugherty's jurisdictional ruling. While Judge Yaffe favorably determined that Hearing Officers lack the authority to award permanent promotions to employees in the context of a job audit challenge, as asserted by Local 1902, he did determine that job audit results are appealable by virtue of the temporary promotion and job audit provisions of the MOU. Mr. Daugherty's procedural ruling, as affirmed by the Superior Court, establishes a precedent to allow AFSCME to challenge job audit results through the MOU hearing officer process.

Metropolitan successfully defended the job audit result under review by Mr. Daugherty (i.e., Hearing Officer Daugherty agreed with the outcome of a job audit conducted by Human Resources), and Judge Yaffe's adverse procedural ruling does not change this successful result.

Matters Involving Metropolitan

Water Resources Center formerly known as the Center for Water Education

Since the last report to the Committee on the status of the Water Resources Center (see General Counsel's April 2007 Activity Report), the following activities have occurred:

- Metropolitan and CWE responded to the California State Parks Office of Grants and Local Services request for information about the future of the education facility. The response outlined Metropolitan's interim plan based on the Board's February action and committed to keep the office informed about the progress of completing construction as well as decisions about the center's future use.
- Metropolitan and CWE amended the Memorandum of Understanding between the entities to provide for the settlement of the ValleyCrest Landscape Development claim.

The settlement provided for payment of the outstanding balance to ValleyCrest and its unpaid subcontractors in exchange for full releases for Metropolitan, CWE, and the Western Center. The settlement also provided for releases of two of the mechanic's liens that had been filed against the facility. In addition to resolving the largest pending claim against the CWE, the settlement provides for completion of construction by early July of those items necessary to obtain a Certificate of Occupancy from the City of Hemet.

- Having received responses from most of the potential CWE creditors, Metropolitan and CWE are proceeding with the evaluation and reconciliation of the final invoices with the goal of resolving many of the claims before the end of June.



- Seeking to expedite the Board's directive that staff seek compatible partners to share operational costs for the facility, Metropolitan is seeking a qualified individual or firm to perform a feasibility study to identify future uses and potential partners.

FERC Relicensing of the Oroville Facilities

As previously reported (see General Counsel's October 2006 Activity Report), a proposed Settlement Agreement containing recommended terms and conditions for a new license for the Oroville Facilities was submitted to the Federal Energy Regulatory Commission (FERC) in March 2006. Since that time, many activities have focused on maintaining and building support for the proposed Settlement Agreement. In particular, the DWR, Metropolitan and other State Water Contractors, and several irrigation districts have been engaged in extensive negotiations over the past few months aimed at resolving concerns regarding the project's potential impacts on rice production. Legal staff participated and provided assistance in these negotiations, which appear to be nearing a successful conclusion. If an

agreement can be reached, the irrigation districts will withdraw their opposition to the proposed Settlement Agreement and join the list of stakeholders supporting issuance of a new license for the Oroville Facilities.

Apart from this, legal staff continued to monitor the environmental reviews being conducted as part of the relicensing process. On May 18, 2007, FERC staff issued a Final Environmental Impact Statement (EIS) for the project in which it again rejected nearly all of the arguments made by Butte County and others in opposition to the proposed Settlement Agreement. As in the Draft EIS, FERC staff is recommending that only minor modifications be made to the proposed Settlement Agreement and that, as modified, it be adopted as the terms and conditions for the new license. On May 21, 2007, DWR issued a Draft Environmental Impact Report (EIR) that largely mirrors the EIS. Comments on the Draft EIR must be submitted by July 20, 2007. Metropolitan and the State Water Contractors anticipate submitting comments that are largely supportive of DWR and the Draft EIR.

Cases to Watch

***Natural Resources Defense Council v. Kempthorne (Norton)* (U.S. District Court)**

On May 25, 2007, Federal District Judge Wanger issued a 120-page decision on summary judgment, finding the federal biological opinion for delta smelt to be invalid on several grounds. Among other things, Judge Wanger's decision finds that the biological opinion improperly failed to consider 2004 delta smelt abundance data; relied on legally inadequate mitigation measures that fail to provide sufficient certainty that mitigation actions will actually take place; failed to set proper take limits based on current species abundance; failed to adequately consider impacts of the projects on delta smelt critical habitat; and wrongly ignored

data about global climate change. Judge Wanger's decision concludes that "[based on the legally flawed [biological opinion], an appropriate interim remedy must be implemented" and that a remedies hearing should be scheduled within 30 days. The remedies hearing will focus on whether and to what extent current project operations should be modified until a new biological opinion is developed. Judge Wanger also calendared a Scheduling Conference for May 30, 2007 to discuss the remedies hearing. Metropolitan legal staff attended that hearing and will participate in the remedies phase. The remedies hearing is scheduled for August 21. (See General Counsel's April 2007 Activity Report)

Items of Interest

Legal staff assisted with the sale and delivery of Metropolitan's \$400,000,000 Water Revenue Bonds, 2006 Authorization, Series A.