Metropolitan Water District of Southern California

Office of the General Counsel

Monthly Activity Report – June 2007

Metropolitan Cases

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

As reported last month, in this lawsuit, Watershed Enforcers seeks to require the Department of Fish & Game to act on the CESA consistency submittal of the Department of Water Resources (DWR) even though DWR has withdrawn its consistency submittal and no longer intends to rely on its federal biological opinions as a basis for authorization of take under CESA. On June 15, 2007 the Superior Court heard argument on the writ petition. Metropolitan's counsel argued the matters along with counsel for the State Water Contractors and other water users. The court took the matter under submission and has not yet ruled.

QSA Related Litigation (California Court of Appeals)

In this case, the County of Imperial petitioned the Court of Appeal in 2005 for a writ of mandate to overturn the Superior Court's 2005 ruling dismissing some of the County's claims in the coordinated QSA proceeding. (See General Counsel's March 2007 Activity Report) The Court of Appeal finally issued its decision in this writ proceeding on June 14, 2007. The Court of Appeal upheld the Superior Court's dismissal of the County's claims. The County still has other claims in the QSA litigation that were not dismissed but this Court of Appeal ruling will pare down the County's legal claims in the QSA litigation. The QSA litigation, which has been stayed for more than 2 years while this writ proceeding was pending before the Court of Appeal, probably will resume in the near future.

Cadiz, Inc. v. Metropolitan, etc., et al.

As reported in an oral report to the Legal and Human Resources Committee in May, Plaintiff Cadiz, Inc. alleges breach of contract, breach of fiduciary duty, breach of implied contract, promissory estoppel and specific performance against Metropolitan based on a series of preliminary agreements, but primarily upon a 1998 document entitled "Principles Agreement." The Principles Agreement contained preliminary terms for the development of a program to store water from the Colorado River Aqueduct in an aquifer underlying Cadiz's land and to supply water from that aquifer. The water was to be conveyed to and from the aquifer via an aqueduct constructed for this purpose.

On June 15, 2007, Metropolitan filed a Motion for Summary Judgment. By bringing such a motion, Metropolitan argues that there is no issue of fact in dispute to be decided at trial and, thus, the court can rule immediately as a matter of law. Among other arguments, Metropolitan alleges that the relevant documents are not legally binding, that there was no agreement on critical and material terms on the project and that, to the extent Metropolitan had obligations towards Cadiz, the obligations were fully performed.

Concurrent with Metropolitan's filing of the Motion for Summary Judgment, Cadiz filed a Motion for Summary Adjudication. Such a motion is identical to a Motion for Summary Judgment, but seeks judgment on particular issues or causes of action that will not result in a full adjudication (Metropolitan alternatively seeks summary adjudication if the court does not grant outright summary judgment). Cadiz's motion seeks judgment in its favor on the following two issues: (1) That Metropolitan owed a duty to Cadiz to certify that the project's EIR was complete; and (2) That Metropolitan owed a duty to Cadiz to obtain the necessary right-of-way from the U. S. Bureau of Land Management.

A hearing on both motions is scheduled for August 30, 2007. Past reports are found in the General Counsel's July 2006 Activity Report and the August 15, 2006 Confidential Board Letter 8-8.

AFSCME Local 1902 v. Metropolitan (Hearing Officer Appeal)

On March 22, 2007, Hearing Officer Barry Winograd conducted a hearing in connection with various pending hearing officer appeals to resolve the following jurisdictional issue: whether a hearing

officer under AFSCME MOU Section 6.7 has authority to address unfair practices ostensibly in violation of Metropolitan's Administrative Code. On June 15, 2007, Local 1902 and Metropolitan reached a settlement prior to the issuance of a decision. Under the settlement, Local 1902 agreed with Management's position that unfair practice claims alleging a violation of the Administrative Code or the Myers-Milias -Brown Act are not subject to the MOU grievance and appeal process, but rather are subject to the jurisdiction of the Public Employment Relations Board (PERB), the public agency vested with exclusive jurisdiction to process unfair practice charges. Local 1902 further agreed to remove all unfair practice allegations from its current grievances and pending appeal requests. In response, Management agreed to allow AFSCME the opportunity, if timely and procedurally appropriate, to re-file with PERB any unfair practice alleged in a pending grievance.

AFSCME Local 1902 v. Metropolitan (Public Employment Relations Board)

On March 22, 2007, AFSCME lodged an unfair practice charge with the Public Employment Relations Board (PERB). The charge requested an order requiring Metropolitan to rescind amendments made to Section 6117 of the Administrative Code on October 10, 2006. Those amendments conform the Administrative Code to legislation modifying the Meyers-Milias-Brown Act, which placed local agency unfair practice charges under the initial and exclusive jurisdiction of PERB. On June 15, 2007, Local 1902 and Metropolitan reached a settlement. Pursuant to the settlement, AFSCME withdrew its charge with prejudice. In exchange, Management agreed to meet with Local 1902 to discuss the amendments.

AFSCME Local 1902 v. Metropolitan (Hearing Officer Appeal)

In a decision dated June 18, 2007, Hearing Officer David B. Hart issued his ruling in a disciplinary matter involving the termination of a District employee for excessive tardiness. While Mr. Hart agreed with Management's position that the employee's misconduct warranted serious discipline, he did not agree that a termination was in order due to the premature and inadvertent ending of the employee's corrective action plan. The employee's corrective action plan had ended early due to the retroactive application of the current AFSCME MOU, which reduced the length of correction action plans from 90 working to 90 calendar days. Consequently, Mr. Hart reduced the termination to a 75-day suspension without pay.

Matters Involving Metropolitan

State Water Resources Control Board Workshop on the Delta Smelt Decline

The State Water Resource Control Board held a workshop on June 19, 2007 to receive information and recommendations on short-term actions the SWRCB could take to improve fishery resources, most particularly focusing on the delta smelt. Metropolitan staff assisted in preparing comments on behalf of the State Water Contractors and separate comments on behalf of the urban state contractors and the Contra Costa Water District. The State Water Contractors' comments reminded SWRCB that the state and federal water projects already were being regulated by the state and federal fishery agencies under the Endangered Species Acts and by the courts in recent litigation so that additional action against the projects would not be productive. The comments also urged SWRCB to consider actions addressing the impacts of other persons or entities that harm delta smelt, including those who discharge toxic and other point and non-point waste to the Delta watershed; divert water from critical habitat of smelt and other listed species; and in particular impacts of the Sacramento Regional Wastewater Treatment Plant. The state and federal water projects and fishery agencies also advised SWRCB of the actions being taken by them under the Endangered Species acts and existing litigation and recommending that SWRCB take no further action regarding the projects at this time.

Cases to Watch

Natural Resources Defense Council v. Secretary of the Interior Kempthorne (Norton) (U.S. District Court)

As reported last month, Judge Wanger ruled that the Delta Smelt Biological Opinion was invalid. On June 22, 2007, Judge Wanger denied the plaintiffs' request for a temporary restraining order, which might have shut down operation of the State Water Project and Central Valley Project pumps. Judge Wanger ruled that the plaintiffs had failed to supply sufficient scientific evidence to show that the take of delta smelt at the pumps at this particular time would jeopardize the existence of the species. There was evidence that water temperatures around the pumps had increased to the lethal limit for the fish, which meant that they would die anyway even if pumping were curtailed. The evidence also showed that a large portion of the fish population had migrated to cooler waters in Suisun Bay, and was no longer in the vicinity of the pumps. The judge, however, allowed the plaintiffs to file a motion for a preliminary injunction if they had additional scientific evidence to show that pumping threatened the extinction of the fish. (See General Counsel's April and May 2007 Activity Reports)

National Association of Home Builders v. Defenders of Wildlife; Environmental Protection Agency (EPA) v. Defenders of Wildlife (Supreme Court Case)

On June 25, 2007 the Supreme Court, in a 5-4 decision, reversed a Ninth Circuit Court of Appeals decision in Defenders of Wildlife v. EPA holding that the Endangered Species Act (ESA) imposed additional duties upon EPA in authorizing state permitting programs under the Clean Water Act (CWA). The Ninth Circuit held that the ESA independently requires EPA to complete a Section 7 consultation and include any conditions necessary to protect listed and endangered species before approving a state's request to operate its own permitting program under the CWA. The Supreme Court found that once the nine statutory criteria set forth in Section 402 of the CWA (which do not reference the ESA) are met, EPA must transfer the permitting authority and has no discretion to impose additional conditions. It upheld EPA's reliance on federal regulations (50 C.F.R. §402) requiring a federal agency to comply with the ESA's consultation requirements only where discretionary federal action is contemplated. The case had broad implications, potentially subjecting all federal actions, including CWA permits and federal water supply contracts, to ESA consultation requirements. The decision may also be relevant to Colorado River operations where various statutes limit the discretion that the Secretary of the Interior has in operation of the river. Metropolitan, along with the San Diego County Water Authority, the Southern Nevada Water Authority, and other western water agencies filed a joint amicus brief in the case asking the Court to reverse the Ninth Circuit holding. (See General Counsel's September 2006 and October 2005 Activity Reports)

Opinion of the court, including dissenting opinions:
http://www.supremecourtus.gov/opinions/06pdf/06-340.pdf

Transcript of oral argument:
http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-340.pdf

United States v. Atlantic Research Corp. (U.S. Supreme Court)

The U.S. Supreme Court has unanimously held that Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) gives potentially responsible parties (PRPs) the opportunity to seek contribution from other responsible parties and clean up contaminated sites before the EPA formally commences an enforcement action or goes through the lengthy process required to designate a Superfund site. The decision is seen as positive by the water supply industry because it is likely to encourage parties to begin cleanup activities for sites, including contaminated groundwater supplies, and then seek contribution from other responsible parties. ACWA along with the National Association of Water Companies, California Water Association, Castaic Lake Water Agency, San Gabriel Basin Water Quality Authority, and Main San Gabriel Basin filed an amicus brief supporting the position adopted by the court. (See the General Counsel's February 2007 Monthly Activity Report.) Opinion found at http://www.supremecourtus.gov/opinions/06pdf/06-562.pdf

Items of Interest

Metropolitan's $318,425,000 Water Revenue Refunding Bonds, 2007 Series A-1 and A-2 and Water Revenue Bonds, 2006 Authorization Series B were issued on June 7. Legal Department attorneys assisted outside bond counsel in the documentation for these auction rate securities and updated Appendix A to the Official Statement, describing Metropolitan. We also prepared and published a supplement to the Official Statement describing two significant events occurring after the bonds were priced and before the closing--the federal district court's summary judgment ruling in *Natural Resources Defense Council v. Kempthorne*, which declared the federal biological opinion for Delta smelt invalid (reported in the General Counsel's Monthly Activity Report for May) and DWR's decision to temporarily halt pumping at State Water Project facilities in the Bay-Delta to provide maximum protection to Delta smelt.