Metropolitan Cases

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

On August 31, 2007, after an evidentiary hearing lasting seven days, Judge Wanger ruled from the bench and directed that the State Water Project and Central Valley Project operate according to certain specified criteria until a new Biological Opinion for the delta smelt is issued some time in 2008. The operational criteria generally specify a range of reverse flows for Old and Middle River near the location of the project pumps during the winter and spring. According to a preliminary estimate by the State Water Contractors' staff, these reverse flow criteria will reduce project deliveries by between 4-30% depending upon water year type and the particular reverse flow selected from within the range specified. Judge Wanger has directed the parties to submit proposed findings of fact and conclusions of law and a proposed preliminary injunction by October 22, 2007. (See the General Counsel's April, May, June and July 2007 Activity Reports for background of this case.)

***Alameda County Water District v. Sacramento Regional County Sanitation District; Contra Costa County Water District v. Sacramento Regional County Sanitation District* (Sacramento Superior Court)**

In this litigation, Metropolitan and the Alameda County Water District, Alameda County Flood Control and Water Conservation District Zone 7, Santa Clara Valley Water District, and Contra Costa Water District are challenging Sacramento Regional County Sanitation District's Environmental Impact Report (EIR) for an expansion of its wastewater treatment plant. The immediate plant expansion will increase discharges to the Sacramento River from 154 million gallons per day (mgd) to 218 mgd while providing only secondary treatment, resulting in a 42 percent increase in pollutant loadings. Ultimately, the plant will discharge up to 517 mgd. This month, Metropolitan staff, in cooperation with outside counsel for the other water agency challengers, prepared a joint Reply Brief, completing the briefing on the merits of this case. The case will be heard on September 21 in Sacramento County Superior Court. (See July 12, 2004 Confidential Board Letter 9-7; April 11, 2006 Board Letter 8-6; and General Counsel's April 2006 Activity Report)

***QSA Related Litigation* (California Court of Appeals)**

After a two-year hiatus occasioned by a writ proceeding in the Court of Appeal, litigation related to the Colorado River Quantification Settlement Agreement has resumed in the Superior Court in Sacramento. The Superior Court has directed the parties to submit case management statements, and has set a case management conference for September 14, 2007. We expect that after this hearing, the court will set forth a "road map" for future proceedings on further legal challenges to some of the claims, class certification, preparation of the administrative record, and the order in which the QSA cases will be tried. (See the General Counsel's February, March and June 2007 Activity Reports)

***Holy Hill Community Church v. Myung Kyun Kim, et al.*, (Los Angeles Superior Court)**

Metropolitan's involvement in this case arises from its sale of the Sunset headquarters building and parking garage in 1995. As part of the sale, Metropolitan took back a loan securing a portion of the purchase price secured by the property and portion of the garage for continued use of its fleet maintenance facility. When the buyer, Holy Hill Community Church, was going to default on the loan, Metropolitan agreed to take back ownership of the parking garage. Under the current arrangement, Metropolitan leases to Holy Hill the use of the top two floors of the parking garage through March 2022. Holy Hill has a right to repurchase the entire garage for the amount of the loan forgiven by Metropolitan ($2.91 million) when it took back title. Metropolitan has the right to continue its use of the fleet maintenance facility, even if Holy Hill repurchases the garage, through March 2022.

Holy Hill subdivided the Sunset headquarters to create a separate parcel consisting of the office tower on the property. The tower was eventually

sold to a developer, along with rights to use unspecified parking spaces. A lawsuit was filed over whether the developer's parking rights were on-site at the Sunset headquarters parcel or were in the parking garage. The developer sued Metropolitan to establish its rights to use the garage if necessary. Metropolitan was eventually dismissed from the case, and a trial was held in early July over the respective rights of Holy Hill and the developer to parking. A presentation on this matter was provided in closed session to the August meeting of the Legal and Human Resources Committee. Subsequent to the August meeting, on August 17, the court issued its ruling that the developer has the rights to use 178 parking spaces on the headquarters property. This should satisfy the parking requirements of the developer, and it should have no further claims to the use of Metropolitan's parking garage. Holy Hill will continue to have its rights under the lease agreement to utilize the parking garage in connection with the portion of the headquarters property that it still owns. Metropolitan's rights to use the fleet maintenance facility are unaffected by the court's ruling. (See the General Counsel's December 2006 Activity Report)

Cases to Watch

***Spirit of the Sage Council v. Kempthorne*, U.S. District Court for the District of Columbia**

Metropolitan has been monitoring this case that challenges the "no surprises" regulations applicable to incidental take permits issued under the federal Endangered Species Act. Under the Clinton Administration, regulations were adopted to provide certainty to applicants for incidental take permits that they would not be forced to increase their commitments of resources (land, water, or money) made in an approved habitat conservation plan. The adoption of the regulations resulted in a substantial increase in the number of habitat conservation plans around the country as private developers and local agencies recognized the benefits of the certainty provided by incidental take permits protected by the "no surprises" assurances.

Environmental organizations challenged the regulations, and the District of Columbia district court ruled in 2003 that they had been adopted without the proper administrative procedures. The Fish and Wildlife Service re-adopted the regulations in 2004 after providing for public comment. Again, the environmental organizations challenged the regulations, this time on the ground that they contravene the requirements of the Endangered Species Act. On August 30, the district court issued its ruling upholding the regulations.

Metropolitan is a participant in several regional habitat conservation plans, and has invested substantial resources in reliance on the validity of the incidental take permits and the assurances that no additional costs will be imposed for endangered species protection beyond those already committed. This decision upholding the "no surprises" regulations will remove a cloud of uncertainty hanging over those conservation programs. (See the General Counsel's July 2004 Monthly Report)

***City of Calexico v. Imperial Irrigation District* (San Diego County Superior Court Case)**

The General Counsel and attorneys on behalf of Municipal Water District of Orange County joined in a friend-of-the-court brief prepared by the San Diego County Water Authority asserting that wholesale water rates are not subject to Article XIII D of the California Constitution (Proposition 218). Proposition 218 imposed additional notice, hearing and protest procedures for the adoption or increase of property-related fees and charges, including charges to a property owner or resident for water delivered through an existing connection. (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, analyzed in the General Counsel's report to the Board dated August 7, 2006.)

Wholesale water deliveries are generally acknowledged to be outside the scope of Proposition 218. However, in *City of Calexico v. Imperial Irrigation District* (San Diego County Superior Court Case No. GIC857142), Calexico claimed that IID's rate increase was invalid, in part because IID had failed to follow the Proposition 218 procedures. The trial court dismissed the case on other grounds and Calexico has appealed. The friend-of-the-court brief to the Court of Appeal addresses the Proposition 218 issue.