Metropolitan Cases

Cadiz, Inc. v Metropolitan **(Los Angeles Superior Court)**

On October 4, 2007, the parties argued cross-motions for Summary Judgment/Summary Adjudication. At the October Board we reported that the court's tentative ruling was largely in favor of Metropolitan.

The court's final ruling issued on October 19 sustained the tentative ruling. Cadiz's Motion for Summary Adjudication asking the court to find that Metropolitan had a duty to Cadiz to certify the project Environmental Impact Report and to accept the right-of-way (ROW) from the Bureau of Land Management (BLM) was denied.

The court also denied Metropolitan's Motion for Summary Judgment, which would have disposed of the case in its entirety. However, it granted Metropolitan's Motions for Summary Adjudication on four of the five remaining causes of action. The court found there was no cause of action for breach of contract, promissory estoppel, breach of implied contract or specific performance. The court denied Metropolitan's motion relative to breach of fiduciary duty, finding that Metropolitan failed to demonstrate that, as a matter of law, there was no such breach.

In November Metropolitan plans to make another motion to seek final resolution of the fiduciary duty issue. There are also a number of pending discovery matters, including 3 motions and at least 16 depositions, which Metropolitan is requesting that counsel for Cadiz agree to hold over until after the hearing on the fiduciary duty motion. (For background of the case see General Counsel's June and July 2006 Activity Reports and August 21, 2007 Confidential Board Letter 8-4)

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

On October 26, a bench trial was held by Sacramento Superior Court Judge Cadei in this California Environmental Quality Act (CEQA) suit concerning a major expansion of the Sacramento Regional County Sanitation District's wastewater plant. This litigation was brought by Metropolitan along with 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 over concerns that the Sanitation District's Environmental Impact Report (EIR) failed to address significant water quality impacts of the expansion project. 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. Argument and briefing of the case was divided for Plaintiffs between Metropolitan staff and outside counsel for Alameda County Zone 7.

Judge Cadei issued a tentative ruling, finding in favor of plaintiffs on 8 out of 11 CEQA claims: that the EIR failed to apply antidegradation policy to the water quality impact conclusions; failed to address significant water quality impacts from nutrients, pathogens, total organic carbon, chloride, and chlorine; failed to address "double-dosing" events (in which the river reverses flow such that the plant "double doses" effluent when the river returns to normal flow); and failed to adequately address cumulative impacts. If the tentative ruling stands, the Sanitation District will be ordered to vacate its certification of the EIR and its approval of the project, and directed to perform a new environmental analysis of the expansion project. (See July 12, 2004 Confidential Board Letter 9-7; April 11, 2006 Board Letter 8-6; and General Counsel's April 2006 and August 2007 Activity Reports.)

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

AFSCME lodged unfair practice charges with the Public Employment Relations Board (PERB) on October 2, 4 and 23, 2007. The October 2 charge challenges Metropolitan's use of customer service standards during the evaluation process, as well as the low-level discipline of an employee for engaging in misconduct affecting quality customer relations. The October 4 charge challenges a May 24 communication to all Water System

Operations employees reminding managers and employees alike that it is their responsibility to ensure they are appropriately trained to safely perform their jobs. The October 23 charge claims Metropolitan issued new duties to a Laboratory Technologist. All three charges allege Metropolitan engaged in the challenged conduct without affording AFSCME notice and the opportunity to meet and confer. Metropolitan disputes these charges, and will seek a dismissal on the basis that the charges fail to establish a *prima facie* violation of the statutory meet and confer obligation.

***AFSCME Local 1902 v. Metropolitan (Hearing Officer Appeal*)**

On May 5, 2005, AFSCME filed a grievance on behalf of a Maintenance Mechanic I alleging Human Resources conducted an improper job audit. Management denied the grievance and a hearing was held before David B. Hart on August 9, 2007. Mr. Hart agreed with management and denied the grievance in a decision dated October 23. He did not find any flaw whatsoever with the job audit process. In addition, the decision acknowledges the MOU hearing officer procedure is not the proper forum for modifying existing job classifications

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

In this case, which challenges the authorization and implementation of the All-American Canal (AAC) Lining Project, the plaintiffs have appealed the Superior Court's judgment dismissing their lawsuit. The Superior Court dismissed the suit on the ground that the United States, which owns the AAC, is an indispensable party who had to be joined in the lawsuit but could not be because of federal sovereign immunity. (See General Counsel's September and November 2006, January and April 2007 Activity Reports)

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

This case involved the California Department of Water Resources' (DWR) submittal of a request for a consistency determination to the California Department of Fish and Game (DFG) for California Endangered Species Act (CESA) authorization for the take of listed fish species caused by operation of the State Water Project. DWR later withdrew that consistency submittal and decided to seek CESA take authorization for State Water Project impacts through a different route. Watershed Enforcers then sued, contending that DWR's consistency submittal could not be withdrawn, and that DFG had to act on that submittal. Metropolitan and other water agencies intervened in the case in support of the state agencies. The Superior Court rejected Watershed Enforcers' claims and ruled that DFG could properly terminate the consistency proceeding once DWR withdrew its consistency submittal. The time to appeal the Superior Court's judgment having now run without an appeal having been filed, the case has been concluded in favor of the state agencies. (See General Counsel's May and June 2007 Activity Reports)

Matters Involving Metropolitan

***Phelps v. State Water Resources Control Board; Department of Water Resources* (California Court of Appeal)**

On October 29, 2007, the Third District Court of Appeal upheld a civil penalty imposed by the State Water Resources Control Board (SWRCB) on diverters in the Delta for violations of Term 91. Term 91 is a general term imposed in water rights permits to protect State Water Project (SWP) and Central Valley Project (CVP) water supplies. It requires water rights holders subject to the permit to cease diverting water when there is not sufficient *natural* flow available for their diversions above the needs of higher priority in-basin needs and Delta requirements. In that situation, diverters would be taking *stored* water released by the SWP and CVP to meet project purposes. When Phelps and other Delta diverters ignored the SWRCB's 2000 notice to cease diverting under Term 91, SWRCB initiated a civil liability proceeding and imposed civil penalties ranging from $7,000 to $45,000. Phelps sued in the Sacramento Superior Court, but that Court upheld SWRCB in all respects, and so has the Court of Appeal.

In upholding SWRCB the Court of Appeal made a number of significant legal determinations,

including:

- Term 91 is an appropriate measure for requiring in-basin diverters to share responsibility to meet Delta requirements
- Term 91 does not violate the Watershed Protection Act because that Act only applies to rights to divert natural flow, but not to diversions of stored water released by the SWP and CVP. Stored water releases are not available for appropriative rights or for riparian users
- Term 91 does not violate the Delta Protection Act because that Act does not grant any kind of water right to a particular party
- Term 91 does not violate California's water rights priority scheme because it applies only to the diversion of natural flow, but not to storage releases

This case builds and expands on similar opinions issued by Judge Robie of the same court (*State Water Resources Control Board Cases* and *El Dorado Irrigation District v. SWRCB*). Unfortunately, the Court of Appeal currently has no plans to "publish" the opinion. If it does not, parties in other litigation would not be able to cite or rely on the opinion as controlling precedent. Consequently, Metropolitan and the other State Water Contractors will likely request the court to issue it as a published opinion.

Inbasin State Water Contractors' Claim to Entitlement to No Cut Contracts

On October 8, 2007 a group of state water contractors (Solano County Water Agency, Napa County Flood Control & Water Conservation District, Butte County and City of Yuba City) filed a claim with the California Victim Compensation and Government Claims Board asserting that they are entitled to 100% deliveries of their Table A amounts under the State Water Contract. These contractors allege that they are located in the so-called area of origin, and that based on their location they are entitled to 100% deliveries of State Water Project water before any water is delivered to contractors located south of the Delta. Based on DWR's current 60% allocation, the claimants allege DWR's failure to deliver their full Table A will result in damages of about $10 million in 2008. The Claims Board has 45 days to take action on the claim; if it does not act in that time the claim is deemed rejected. Metropolitan staff, along with other export state water contractors, drafted a response and is reviewing Metropolitan's options with respect to the claim.

Coalition for a Sustainable Delta 60-Day Notice to Sue California and Federal Fishery Agencies Regarding Sport Fishing Regulations Impacts on Listed Species

On October 25, 2007 the Coalition for a Sustainable Delta sent a 60-Day Notice of Intent to sue the California Department of Fish and Game (DFG), California Fish and Game Commission, United States Fish and Wildlife Service and National Marine Fisheries Service, asserting that sport fishing regulations promulgated, promoted or enforced by those agencies for the non-native striped bass result in the take of listed species in the Delta. The Coalition—made up of four member agencies of the Kern County Water Agency—alleges that even though the striped bass is a major predator of listed species, the fishery agencies have participated in striped bass propagation, restoration, protection and conservation actions resulting in the take of listed species, and in particular of delta smelt. Metropolitan will monitor the notice and consider whether any action is necessary with respect to the issue raised in the notice.

Center for Biological Diversity 60-Day Notice to Sue Asserting Improper Decisions by the United States Fish and Wildlife Service

The Center for Biological Diversity (Center) has sent a 60-day notice of its intent to sue the United States Fish and Wildlife Service (USFWS) asserting several politically motivated decisions under the Endangered Species Act. The notice claims that in four listing decisions, seven five-year species reviews and 44 critical habitat decisions across the country USFWS scientists were "overruled" by "high ranking bureaucrats." Included in the complaint is USFWS' 2003 decision not to list the Sacramento splittail. The splittail had been listed previously, but a federal district court invalidated the listing in litigation filed by the State Water Contractors. On remand from the court, USFWS issued its 2003 determination that another listing was not warranted. The Sacramento splittail resides in the Delta and any reconsideration of the decision not to list could have some impact on SWP operations. The Center's notice also refers to a 2005 designation of critical habitat for the southwestern willow flycatcher that resides in California and several other Colorado River Basin states. If USFWS were required to revise its

habitat designation for the flycatcher it could have some impact on the Secretary of the Interior's Colorado River water supply operations. Staff is monitoring and evaluating potential action.

California Fish and Game Decision Not to List the Long Fin Smelt on an Emergency Basis

The California Fish and Game Commission (Commission) declined on October 11, 2007 to list the Long Fin smelt on an emergency basis under the California Endangered Species Act (CESA). The Commission did, however, direct its staff to consider whether to list the Long Fin as a "candidate" species while it considers whether to list the species as threatened or endangered under the normal process. The Commission could act on a potential candidate listing at its December 2007 meeting, but is more likely to consider it at its February 2008 meeting. Under CESA, a candidate species is subject to the same protections as a "threatened" species pending a formal listing decision. The Long Fin smelt inhabits the Delta and if it is listed as a candidate species or ultimately as threatened or endangered the listing could have some impacts on SWP operations. Metropolitan staff is working with other SWP and CVP contractors to respond to the candidate petition. A petition to list the Long Fin under the normal federal ESA process also is pending; however the federal act does not have a similar "candidate" status."

Cases to Watch

Pacific Coast Federation of Fishermen's Assns. v. Gutierrez **(U.S. District Court)**

On October 3, 2007, Judge Wanger held a hearing on the cross-motions for summary judgment in *PCFFA v Gutierrez*, the federal lawsuit challenging the salmon Biological Opinion. At the close of the hearing, the judge took the matter under submission without ruling on the legality of the Biological Opinion. The judge also did not specify any date by which he would issue a ruling. While disputing many of plaintiffs' legal claims, the federal defendants and water contractor intervenors conceded that there were certain legal defects in the salmon Biological Opinion in light of Judge Wanger's previous ruling on the legal defects in the delta smelt Biological Opinion. (See General Counsel's July and December 2006 and February 2007 Activity Reports)

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

In this case, Judge Wanger previously found that the delta smelt Biological Opinion for the Central Valley Project and State Water Project was invalid. After an evidentiary hearing, Judge Wanger issued an oral ruling in August on an interim remedy that is to be imposed while a new Biological Opinion is being developed. In October, the State Water Contractors (SWC) and other parties submitted proposed Findings of Fact and Conclusions of Law to implement the judge's earlier oral ruling on an interim remedy. The SWC also submitted objections to the plaintiffs' proposed Findings of Fact and Conclusions of Law. Metropolitan staff helped in the drafting of the SWC's proposed Findings and Conclusions. Judge Wanger will now review the various proposed Findings and Conclusions, and prepare his own Findings and Conclusions using the proposed submittals as he sees fit. There is no set deadline by which the judge will issue his final Findings and Conclusions on an interim remedy. On November 9, 2007, the plaintiffs filed a new motion for partial summary judgment and injunctive relief. The plaintiffs' motion seeks to set aside CVP water contract renewals that were based upon the now-invalidated delta smelt Biological Opinion. This motion targets CVP, not SWP contracts . The plaintiffs have noticed the hearing on their motion for December 10, 2007 but that hearing date may well be changed to a later date. (See General Counsel's July 2006 and April, May and June 2007 Activity Reports)

Lexin v. The Superior Court of San Diego County **(California Supreme Court)**

The collective bargaining process in California may be altered, if the California Supreme Court declines to review *Lexin v. Superior Court*. This case arose out of a decision by the San Diego Employees' Retirement System (SDCERS) board of administration to modify the funding of its pension system, while the City of San Diego negotiated increased pension benefits for City employees. The San Diego County District

Attorney brought a criminal proceeding against certain members of the board, alleging a violation of Government Code section 1090. Section 1090 prohibits a public official or employee from participating in a public agency decision in which the official or employee has a financial interest. In *Lexin*, the district attorney argued that the board members who are public employees have an indirect financial interest in the decision to increase the pension benefits because they are members of the bargaining units that would be affected by the change to the benefits. The board members argued in response that their decision fell within the salary exception to section 1090, which provides that participating in a decision affecting the official's or employee's own salary does not constitute a 1090 violation. The 4th District Court of Appeal did agree that pension benefits are part of an employee's salary for purposes of the salary exception. The Court noted, however, that the salary exception contained its own exception where the decision "directly involves the department of the government entity that employs the officer or employee." In a case of first impression, the Court found that a salary or benefit increase that goes to the entire work force still directly involves the officer's or the employee's department because that department would get the enhancement along with everyone else.

Prior to *Lexin*, the universal interpretation by local government agencies has been that "directly" means solely or exclusively. So, unless the benefit was going exclusively to elected officials or management, they could participate in contract negotiations with employee organizations. This has allowed elected officials and management to negotiate labor agreements with bargaining units even though they receive some of the same benefits. For example, typically pension plans require all general employees, including management, to belong to the same plan. The Legal Department will monitor this decision and evaluate its impact on the upcoming MOU negotiations. The defendants have petitioned the California Supreme Court for review. The California State Association of Counties, the League of California Cities, and ACWA plan to file a letter with the Supreme Court in support of review. The *Lexin* decision can be viewed at: http://www.courtinfo.ca.gov/opinions/documents/D049251.PDF