



## Metropolitan Cases

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

As reported previously, the first phase of trial on contract interpretation was completed on December 12, 2008. Typically, the parties give oral closing arguments at the end of trial. However, given the scope and complexity of this case, the parties requested permission to submit written post-trial briefs instead, to which the court agreed. Plaintiffs' initial brief was filed on February 25, 2009. Though lengthy (85 pages), this brief does not appear to present any significant new factual information or legal arguments. Instead, it mainly reiterates Plaintiffs' assertions that: (1) power generated by the Hyatt-Thermalito complex would be sold at "market"; (2) total revenues from such sales would be applied to

reduce "water supply" costs; and (3) water supply costs would be reflected in and recaptured through the Delta Water Charge.

The Department of Water Resources' (DWR) and Intervenor's responsive briefs are due on April 24, and Plaintiffs' final brief is due on May 26. Given this extended briefing schedule and the extensive amount of evidence that the court will have to review and consider, a decision on this first phase of trial is not expected until fall 2009, at the earliest. If the decision is favorable to DWR and the Intervenor, this case will be over at the trial level and the Plaintiffs then will have to decide whether or not to appeal. If the decision is favorable to Plaintiffs, the litigation will move into the next phase of trial concerning the parties' affirmative defenses. (See General Counsel's October and December 2008 Monthly Activity Reports)

## Matters Involving Metropolitan

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

On Feb 23, 2009, Judge Wanger granted the motion to extend the time when the new salmon Biological Opinion is due from March 2, 2009 to June 2, 2009. The federal government had sought the extension because of the complex nature of the issues in the salmon Endangered Species Act (ESA) consultation. None of the parties opposed the extension request. (See General Counsel's August and September 2008 Monthly Activity Reports)

### ***San Luis & Delta-Mendota Water Authority and Westlands Water District v. California Fish & Game Commission; Kern County Water Agency v. California Fish & Game Commission; State Water Contractors v. California Fish & Game Commission (Los Angeles Superior Court)***

In these three cases which challenged the California Fish and Game Commission's incidental take regulation for longfin smelt, Judge Yaffe of the Los Angeles Superior Court denied the motions of the Federal and State water contractors for a

preliminary injunction against implementation of the regulation. Judge Jaffe's rulings, which were issued on February 19, 2009, found that there was no need for a preliminary injunction to protect the water contractors because the longfin regulation is due to expire soon and the Department of Fish and Game (DFG) had not taken any action under the longfin regulation to restrict operations of the State Water Project or Central Valley Project. The longfin regulation expires on March 4, when the status of the longfin as a candidate species will end and DFG must decide whether to list the longfin as a threatened species.

### **Longfin 2081 Permit**

On February 23, 2009, DFG issued a California Endangered Species Act (CESA) section 2081 incidental take permit to DWR for the incidental take of longfin smelt by the State Water Project. The 2081 permit for longfin relies on an adaptive management process to adjust the level of project exports to minimize the take of longfin at the pumps. This adaptive management process uses a variety of information, including salvage data, modeling, fish surveys showing the geographical



distribution of longfin and other factors to select what level of project exports is appropriate. Metropolitan and the contractors are evaluating the 2081 permit and assessing its potential water supply impact. (See General Counsel's November 2008 Monthly Activity Report)

### **State Water Resources Control Board Urgency Standards Relaxation Hearing**

The State Water Resources Control Board (SWRCB) held two days of hearings (February 17 and 18) on a joint petition filed by DWR and Bureau of Reclamation (Bureau) seeking to temporarily relax certain standards in the Delta. Due to the dry conditions over the last three years, the depleted storage available in upstream reservoirs may not be sufficient to meet the needs for a reserve of cold water for release later in the year to benefit threatened and endangered salmon and steelhead, retention of water needed to control salinity in the Delta and to provide supplies for project contractors. In order to preserve the storage, DWR and the Bureau requested the SWRCB to relax the "X2" flow standard during the month of February. DWR and the Bureau presented their cases for the relaxation at the hearing; the Bay Institute, Delta interests (South Delta Water Agency, Central Delta Water Agency, San Joaquin County) and CalSPA presented evidence in opposition. Policy statements in support of the petitions were made by the state and federal fishery agencies, the State Water Contractors, San Luis Delta-Mendota Water Authority, Contra County Water District, Stockton East Water District and San Joaquin River Group.

SWRCB subsequently denied the petition on February 24, 2009. While SWRCB agreed that DWR and the Bureau were in good faith when they filed the petition on February 10 and an urgency may have existed at that time, there is no longer an urgency because the recent rains made it possible for the projects to meet the X2 requirement. With respect to one portion of the petition—relaxation of the "starting gate" requirement to meet a certain salinity condition at least one day between February 1 and 14—SWRCB held that it could not retroactively revise that standard. But SWRCB also said that based on the circumstances of this case, it does not recommend taking enforcement action against the projects for any violation of the starting gate requirement. It also urged the projects to file any additional petitions they thought necessary during 2009 as early as possible.

### ***Solano County Water Agency, et al. v. State of California Department of Water Resources* (Sacramento Superior Court)**

The Sacramento Superior Court granted a motion to intervene by Metropolitan and 12 other state water contractors in this case on February 25, 2009. This action was filed by four state water contractors located north of the Delta alleging that since they are located in the "area of origin" of State Water Project (SWP) water, they should not be subject to the shortage provisions of their state water contracts. If plaintiffs are successful, it would result in less water available for Metropolitan and the other contractors during shortage years. Metropolitan and its fellow intervenors are now full parties and intend to vigorously support the DWR interpretation of the contract shortage provisions and protect our interests in our SWP supply. (See General Counsel's January and September 2008 Monthly Activity Reports)

### **FERC Relicensing of the Oroville Facilities**

As reported last fall, Butte County and Plumas County filed separate lawsuits on August 21, 2008, challenging the adequacy of the Final Environmental Impact Report (Final EIR) that was issued by DWR in conjunction with the relicensing of the Oroville Facilities by the Federal Energy Regulatory Commission (FERC). The recommended terms and conditions for the new license are set forth in a Settlement Agreement that was signed by over 50 stakeholders, including Metropolitan, other State Water Contractors (SWCs), the City of Oroville, the Town of Paradise, various business and recreation interests, and several key federal and state regulatory agencies. This Settlement Agreement, in turn, was identified as the "preferred alternative" in the Final EIR.

These lawsuits name DWR as the primary defendant and all other signatories to the Settlement Agreement, including Metropolitan, as "real parties in interest." The Butte County complaint alleges that DWR's environmental review contains four "foundational errors": (1) failure to conduct a "rigorous climate change assessment"; (2) failure to analyze how changing conditions in the Delta will affect future operations of the project; (3) failure to identify the significant impacts associated with "perpetuating old operating rules"; and (4) failure to address the project's "environmentally significant socioeconomic consequences for Butte." This complaint goes on to assert that these errors



undermined DWR's overall analysis of project impacts, mitigation measures and alternatives. The Plumas County complaint contains essentially the same allegations as the Butte County complaint, except that it also asserts that DWR failed to properly analyze the project's upstream impacts.

Since the date of filing, the primary focus has been on preparing the administrative record for this project, which spans an eight-year period. Because of its voluminous nature, DWR requested and received an extension until February 27, 2009, to prepare and certify the record. However, DWR has not yet completed this task and has asked for an additional 60 days to do so. Plaintiffs have tentatively agreed to extend the deadline only until March 31, 2009.

Beyond this, DWR has filed a motion to consolidate (combine) these actions and seeking to have them tried together at the same time and before the same court. Likewise, the SWCs have filed a motion to change the venue (location) of these actions, both of which were filed in Butte

County Superior Court, to Sacramento County or some other neutral venue. Although the Plaintiffs do not oppose consolidating the two actions, they do oppose moving them out of Butte County. Instead, Plaintiffs have requested that a disinterested judge from a neutral county be assigned to try these cases in Butte County. A hearing on these motions is scheduled for March 6, 2009.

Finally, the SWCs have retained the law firms of Duane Morris LLP and The Sohagi Law Group to represent them both collectively and individually in these actions. Duane Morris has been involved in the relicensing process since its beginning and is intimately familiar with the facts and records that are most likely to be at issue in this case. The Sohagi Law Group specializes in CEQA law and has extensive experience in litigating these types of cases. Both firms will be paid by SWC, Inc., using the pre-existing budget established for the FERC relicensing of the Oroville Facilities. (See General Counsel's August 2008 Monthly Activity Report)