Metropolitan Cases

Central Delta Water Agency, et al. v. U.S. Fish and Wildlife Service, et al. **(U.S. District Court, Eastern District of California)**

On April 13, 2009, the Central Delta Water Agency and the South Delta Water Agency filed suit in federal court in Sacramento challenging the development of the Bay Delta Conservation Plan (BDCP). The complaint alleges that there have been procedural violations of the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), the California Natural Community Conservation Planning Act, and the California Open Meeting Act in the procedures and process being used to develop the BDCP. The complaint names as defendants various federal, state, water agency, and environmental entities and individuals who are members of the BDCP steering committee, including Metropolitan, and Metropolitan employees, Roger Patterson and Randall Neudeck. The Legal Department intends to use in-house staff to defend Metropolitan and the named employees and will coordinate with attorneys for other defendants. Metropolitan's legal staff believes that there are a number of jurisdictional defenses to this lawsuit which will be asserted.

Orange County Water District v. Northrop Corporation, et al.; Northrop Grumman Systems Corporation v. Metropolitan **(Orange County Superior Court)**

In December 2004, Orange County Water District (OCWD) initiated this action against Northrop Corporation and other industrial defendants seeking cleanup costs and damages from volatile organic compound (VOC) contamination of groundwater within the North Basin of the Orange County Aquifer. Groundwater investigations showed perchlorate levels in the basin above the regulatory standard, and the Regional Water Quality Control Board required any cleanup plan to include treatment for perchlorate. Treatment plans that OCWD proposed for perchlorate remediation were much more costly than conventional treatments for VOCs only.

In January 2008, Northrop brought a cross-complaint against Metropolitan, alleging that Metropolitan was responsible for any perchlorate cleanup costs that Northrop would incur, due to perchlorate found in water imported from the Colorado River and originating from industrial sites in Henderson, Nevada. Judge Colaw severed OCWD's claims from Northrop's cross-claims and set different trial dates for the two phases of the case. Northrop may pursue its indemnification cross-claim against Metropolitan only if the court imposes perchlorate cleanup liability on Northrop.

Metropolitan believes that hydrogeologic evidence and the history or past land use practices show that MWD-imported Colorado River water accounts for only a small fraction of the perchlorate in the basin. Also, Metropolitan takes the position that member agencies knowingly placing raw Colorado River water into groundwater basins take the water "as is" and assume responsibility for any effects of recharge.

Metropolitan has been participating in phase-one depositions of parties regarding perchlorate issues and has served discovery upon defendants regarding prior defense-industrial activities that would suggest past use of perchlorate.

Recently, Judge Colaw stayed all proceedings due to the bankruptcy filing by one of the parties. When the stay is lifted, we expect Judge Colaw to set a new phase one trial date, new discovery cut-off dates, etc. The Legal Department also is analyzing the impact of the January 2009 Chapter 11 bankruptcy filing by Tronox Incorporated, the corporate successor to Kerr-McGee Corporation. Kerr-McGee was responsible for contaminating the Las Vegas Wash with perchlorate from its defense-related chemical operations. A cleanup plan is now underway pursuant to a federal court consent decree. (See General Counsel's April 2008 Activity Report)

Colorado River QSA Coordinated Cases **(Sacramento Superior Court)**

In January, the court held a status conference at which it set April 2 as the deadline for the parties to submit dispositive motions as to any outstanding issues. The court also set May 14 and June 8 as

the deadlines for the parties to submit their oppositions and replies, respectively, to these motions. Ultimately, a total of 18 motions were filed, ten by the "Category 1" parties (i.e., parties who support the Quantification Settlement Agreement (QSA)) and eight by the "Category 2" parties (i.e., parties who oppose the QSA). With respect to the motions filed by the Category 2 parties, the court found that a number of them were improper and were aimed at circumventing the current schedule for trial. Under that schedule, all claims pertaining to the validity of the QSA and its related agreements are to be tried first; any claims related to CEQA compliance are to be tried second. Accordingly, on April 21, the court denied without prejudice five of the motions filed by Category 2 parties on the basis that they were premature. At the same time, the court divided the remaining 13 motions into two groups, with one group scheduled to be heard on July 2, and the other group scheduled to be heard on August 20. The rulings on these motions will largely dictate the nature and scope of trial.

The current schedule for trial is as follows: Phase 1A, addressing the validity of the QSA and its related agreements, is scheduled to start on November 9 and conclude by December 1; Phase 1B, addressing any CEQA claims related to the QSA Programmatic Environmental Impact Report (EIR), is scheduled for December 14 through 17; and Phase 1C, addressing any CEQA claims related to the IID Transfer Project EIR, is scheduled to start on January 4, 2010 and conclude by January 19, 2010. Any remaining unresolved claims or issues will be tried in subsequent phases, which have not yet been scheduled. (See General Counsel's September and October 2008 Monthly Activity Reports).

***Barrows v. Southern California Gas Company* (Los Angeles Superior Court)**

On April 22, 2009, Metropolitan was served with a cross-complaint by defendant and cross-complainant Verizon California Inc. Verizon is among the ten public and private owners of subsurface utilities at or near the location where plaintiff Keith Barrows was allegedly thrown from his motorcycle as a result of a defect/depression in the roadway resulting in serious injuries. As reported last month, Metropolitan's Sepulveda Feeder underlies the location of the alleged roadway defect. As yet, there is no evidence that shows a causal connection between the Sepulveda Feeder and the roadway defect. (See General Counsel's March 2009 Activity Report)

Matters Involving Metropolitan

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

Judge Wanger has issued a new decision on the scope of the duty to consult under the Endangered Species Act (ESA) over certain Central Valley Project (CVP) operations. The ESA regulations provide that federal agencies do not have to consult with federal wildlife agencies regarding activities that federal agencies must carry out, and which they lack any discretion to modify or alter. In the lawsuit involving the earlier 2005 Delta smelt biological opinion ("BiOp"), *NRDC v. Kempthorne,* Judge Wanger issued an 86-page ruling on April 27, 2009 on this "non-discretionary" issue. The judge found that the Bureau of Reclamation has no discretion to modify or alter the quantities of water that the Bureau must deliver to CVP "settlement" contractors. These settlement contractors have water rights that preexist the construction of the CVP. Because the Bureau lacked discretion to reduce water deliveries to settlement contractors, and because the Bureau did not have to consult under the ESA over those deliveries, Judge Wanger rejected the claims of the environmental plaintiffs, and held that no ESA consultation was required when these CVP settlement contracts were renewed. Metropolitan's legal staff is studying this recent ruling and evaluating its significance for the claims being asserted in the new lawsuits challenging the 2008 Delta smelt BiOp. (See General Counsel's August 2008 Activity Report)

Delta Smelt Biological Opinion Litigation (*San Luis & Delta Mendota Water Authority v. Salazar*; *State Water Contractors v. Salazar*; *Coalition for a Sustainable Delta v. U.S.F.W.S.*; *MWD v. U.S.F.W.S.)* (U.S. District Court, Eastern District of California)

In the *San Luis & Delta Mendota* case, the Westlands Water District and San Luis & Delta

Mendota have moved for a preliminary injunction to restrain the implementation of Old and Middle River flow restrictions in the Delta smelt BiOp. These restrictions are due to come into effect after the Vernalis Adaptive Management Program (VAMP) period concludes in May. The motion for a preliminary injunction is set for hearing before Judge Wanger on May 22, 2009. The Natural Resources Defense Council and Bay Institute also have moved to intervene in the *San Luis & Delta Mendota* case. Their motion to intervene is also set to be heard on May 22, 2009. The U.S. Department of Justice lawyer representing the federal defendants in the Delta smelt cases has indicated that he plans to file a motion to consolidate all four of the Delta smelt BiOp cases.

***Butte Environmental Council v. California Department of Water Resources* (Alameda Superior Court)**

On April 13, 2009, Butte Environmental Council, the California Sportfishing Protection Alliance and California Water Impact Network filed suit in Alameda Superior Court challenging the implementation of the 2009 Drought Water Bank. The complaint alleges that the Department of Water Resources and state officials failed to comply with CEQA in the adoption and approval of the Drought Water Bank. Metropolitan is named as a Real Party in Interest in the lawsuit, along with other potential sellers and buyers in the Drought Water Bank. However, as of the date of this report, none of the parties had been formally served. The General Counsel's Office is evaluating how best to respond to this lawsuit and has initiated discussions with the other State Water Contractors named in the complaint regarding the possibility of forming a joint defense group.

Items of Interest

Tentative Settlement of Proposed PG&E Rate Increase Proceeding

Working with staff from Water System Operations, legal staff has been monitoring the regulatory proceedings resulting from separate filings by Pacific, Gas & Electric (PG&E) and Southern California Edison (SCE) to increase rates for electric transmission services in 2009. Pursuant to federal law, PG&E's and SCE's proposed wholesale electric rate increases must be filed with and approved by the Federal Energy Regulatory Commission (FERC). These proposed transmission rates would increase the State Water Project power costs by as much as $12 million annually, with roughly $10 million of this attributable to SCE and $2 million to PG&E. Metropolitan is responsible for approximately 70 percent of the Project's power costs and intervened so that it could participate in the FERC proceedings.

On March 30, 2008, PG&E and the intervenors reached a tentative settlement that reduces PG&E's proposed transmission rate increases. The tentative settlement will become final upon FERC's approval. This settlement covers PG&E's proposed wholesale electric rate effective from March 1, 2009 until PG&E replaces it. Historically, PG&E has filed rate increases each year and it expects to file again this summer for an increase in 2010.

SCE's rate increase became effective in March 2009, but is subject to refund depending on the outcome of its FERC settlement proceeding, which is still pending.