



Metropolitan Cases

Monterey II Cases: *Central Delta Water Agency, et al. v. Department of Water Resources; Rosedale-Rio Bravo Water Storage District, et al. v. Department of Water Resources; Central Delta Water Agency, et al. v. Kern County Water Agency* (all pending in Sacramento County Superior Court)

Following the Department of Water Resources' (DWR) May 2010 completion of a new Environmental Impact Report (EIR) for the Monterey Amendment to the State Water Project contracts, three new lawsuits were filed challenging the project. Central Delta Water Agency, South Delta Water Agency, California Water Impact Network, California Sportfishing Protection Alliance, and the Center For Biological Diversity filed a lawsuit against DWR in Sacramento County Superior Court challenging the validity of the EIR under CEQA and the validity of underlying agreements under a reverse validation action (the "*Central Delta I*" case). These same plaintiffs filed a reverse validation lawsuit against the Kern County Water Agency in Kern County Superior Court ("*Central Delta II*"). This lawsuit targets a transfer of land from Kern County Water Agency to the Kern Water Bank, which was completed as part of the original Monterey Amendments. The third lawsuit is an EIR challenge brought by Rosedale-Rio Bravo Water Storage District and Buena Vista Water Storage District ("*Rosedale-Rio Bravo*") against DWR in Kern County Superior Court. Metropolitan is a party in the *Central Delta I* and *II* cases but not in the *Rosedale-Rio Bravo* case. Since the cases were filed, the two Kern County cases have been ordered transferred to Sacramento Superior Court.

In September, Metropolitan and other defendants filed motions to dismiss the reverse validation cause of action in *Central Delta I* for falling outside the statute of limitation period, which we maintain ran from the original approval and execution of the Monterey Amendments in December 1995. This month Metropolitan filed a motion to strike certain allegations in the *Central Delta I* complaint that were improperly pleaded. Both motions will be heard on November 18 by the Honorable Judge Frawley in Sacramento Superior Court.

In addition to early procedural motions, much attention has focused on preparation of the administrative record. *Central Delta I* plaintiffs have requested to prepare the administrative record themselves, wanting to save the expense of having DWR prepare the records. *Rosedale-Rio Bravo* plaintiffs have elected to have DWR prepare the record but are unwilling to shoulder the full costs. Court guidance appears necessary to resolve the record cost and preparation issues.

Metropolitan staff has been coordinating with DWR and the other contractors in our efforts in these cases. (See General Counsel's May and June 2010 Activity Reports)

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

On October 22, 2010, the court awarded Metropolitan and the other intervenors \$243,689.77 in costs. The court also awarded DWR \$59,772.71 in costs. Pursuant to court rules, the payment of these costs by plaintiffs is automatically stayed during the pendency of their appeal.

As previously reported, the court issued a final ruling in favor of DWR and the intervenors. The court rejected all of the arguments made by the plaintiffs challenging the manner in which revenues from the Hyatt-Thermalito power complex have been and are being allocated. This ruling was memorialized in a statement of decision and interlocutory judgment issued by the court on October 16 and November 2, 2009, respectively. Based on this ruling, the court dismissed the remaining causes of actions asserted by the plaintiffs and, on June 17, 2010, entered a final judgment dismissing both the original suit and a related case plaintiffs filed in 2007.

On July 1, 2010, plaintiffs filed a notice of appeal. On July 7, the intervenors filed a notice of cross-appeal. By stipulation of the parties, the briefing sequence will be as follows. Plaintiffs will have 40 days after the record is submitted to the court of appeal to file their Appellants Opening Brief (AOB). DWR and intervenors will have 30 days after the



AOB is filed to submit their Respondents Brief (RB) and combined Respondents Brief/Cross-Appellants Opening Brief (RB/XAOB), respectively. Plaintiffs then will have 30 days after the RB and RB/XAOB are filed to file a combined Appellants Reply Brief/Cross-Respondents Brief. Lastly, intervenors will have 20 days after that to submit their Cross-Appellants Reply Brief. Currently, we anticipate that the record will be completed in mid-December and that all briefing will be completed in April or May 2011. (See General Counsel's May and June 2010 Monthly Activity Reports)

San Diego County Water Authority v. MWD
(San Francisco Superior Court)

This case was formally transferred from the Los Angeles to the San Francisco Superior Court on October 21, 2010. In litigation between public agencies, any party has the right to have the case moved to a "neutral" county and the parties previously had agreed to transfer the case to the San Francisco court. Two pending motions now will be rescheduled for hearing. In the first, Metropolitan and eight member agencies who joined the case in support of Metropolitan moved to dismiss Imperial Irrigation District (IID) and Utility Consumers Action Network (who joined in support of SDCWA) because they are not "persons interested" in Metropolitan's rates. The second is IID's motion to require Metropolitan and the member agencies to file more specific denials to SDCWA's complaint. Metropolitan also filed its objections to SDCWA's request for production of documents on October 21 on the basis that the case will be tried on the administrative record. On October 22, 2010, SDCWA submitted a Public Records Act request for 28 categories of documents dating back 20 or more years, primarily including the same documents listed in their request for production plus documents dealing with Metropolitan's "rate integrity" language. Metropolitan is assembling documents and preparing to respond.

In this litigation SDCWA seeks to invalidate Metropolitan's water rates adopted in April 2010. SDCWA specifically challenges inclusion of State Water Project transportation costs and the Water Stewardship Rate in its water transportation charge. (See General Counsel's August and September 2010 Monthly Activity Reports)

Laron Daffin v. J. F. Shea Construction, Inc., et al.
(Riverside Superior Court)

On October 29, 2010, a jury rendered a 12-0 verdict clearing Metropolitan and co-defendants J.F. Shea Construction Inc. (Shea), County of Riverside (County), and Diamond Paving Inc. of any liability related to a detour road installed during construction of San Diego Pipeline No. 6. Plaintiff Daffin alleged damages in excess of \$2 million for personal injuries from a July 17, 2005 single-motorcycle accident on a temporarily relocated portion of Anza Road in an unincorporated area of the County, east of the City of Temecula. Pursuant to its contract with Metropolitan for work on the project, Shea constructed the temporary portion of road where the injury occurred, in response to the County's requirements and subject to the County's approval. Shea was responsible for construction and maintenance of the temporary road and agreed to defend and indemnify Metropolitan for claims arising out of its work on the project. During trial, the plaintiff was unable to demonstrate that an alleged defect existed on the road or that any actions of the defendants caused the accident.

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

On September 22, 2010 the trial court heard argument on the parties' cross-motions for summary judgment. Plaintiffs, defendant DWR, and a group of state water contractors, including Metropolitan, each filed a motion. Plaintiffs claim that since they are located in the watershed of origin of State project water, they should not be subject to the shortage provisions of their state water contracts. The judge took the case under submission after a three-hour hearing. (See General Counsel's February and May 2010 Activity Reports)

Andrew James Ellsworth, Jr. v. Metropolitan, et al.
(Los Angeles County Superior Court)

Defendants filed a motion for summary judgment or, alternatively, summary adjudication on October 29, 2010. The motion is scheduled for hearing on January 12, 2011.

As previously reported, plaintiff, a Metropolitan employee, filed his initial complaint against Metropolitan and four employees in Los Angeles County Superior Court on September 8, 2009. Plaintiff alleges seven causes of action: discrimination based on race, national origin,



ancestry, and age in violation of the Fair Employment and Housing Act (FEHA); harassment based on race, national origin, ancestry, age, and disability in violation of FEHA; retaliation for opposing discrimination and harassment in violation of FEHA; disability discrimination and failure to accommodate in violation of FEHA; failure to engage in the interactive process in violation of FEHA; failure to prevent harassment, discrimination, and retaliation in violation of FEHA; and defamation. All causes of action are asserted against Metropolitan, and the harassment and defamation causes of action are also asserted against the individual defendants. Metropolitan successfully demurred to an eighth cause of action, for wrongful failure to promote in violation of public policy, and it was dismissed on February 1,

2010. Plaintiff filed a supplemental complaint on March 12, and served the supplemental complaint and summons on all defendants on March 18. On April 15, defendants filed an answer with a general denial. The court scheduled a jury trial commencing February 14, 2011, scheduled a mandatory settlement conference on January 26, 2011, and ordered the parties to complete mediation by August 19, 2010. The parties attended the mediation on August 5 and were unable to settle. The parties are engaged in discovery and have completed thirteen days of depositions. Metropolitan's Legal Department is providing legal representation for all defendants. (See General Counsel's April and July 2010 Activity Reports)

Matters Involving Metropolitan

Department of Fish and Game Delta Flow Criteria

The California Department of Fish and Game (DFG) has issued its draft "Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta" (Flow Report). Last fall's Delta Reform Act required DFG to "develop and recommend to [State Water Resources Control Board] Delta flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern dependent on the Delta." The legislation did not require that DFG follow any public process in developing its draft recommendations and there was no opportunity for public input into the proposed recommendations. DFG has provided an opportunity for comment on the draft Flow Report, and the Legal Department and Water Resources Management staff prepared a comment letter on behalf of Metropolitan and assisted the State Water Contractors and State & Federal Contractors Water Agency in preparing their comments. Similar to flow criteria developed by the State Board earlier this year, if the flow criteria contained in DFG's Flow Report actually were implemented, modeling indicates that they could cost water users throughout the State over five million acre-feet annually. However, the Flow Report recognizes that it only considers potential flow needs without considering several other factors that negatively impact the Delta ecosystem; that improvements such as alternative conveyance, habitat improvements and additional

fish screening are necessary; and that the recommended flow criteria must be balanced with the need for reliable water supply. DFG will consider the comments submitted and finalize its Flow Report before the end of the year. (See General Counsel's February and July 2010 Activity Reports)

Sacramento Regional County Sanitation District NPDES Permit

On October 11, 2010, Metropolitan and several State and federal water agencies filed joint comments on the tentative discharge permit for Sacramento Regional County Sanitation District's wastewater treatment plant. The tentative permit represents Central Valley Regional Water Quality Control Board's staff recommendation and calls for a dramatic reduction of the ammonia discharged by the treatment plant by requiring full nitrification and denitrification treatment by 2020. The tentative permit also requires tertiary filtration treatment to meet pathogen removal requirements.

The water agencies' comments support the tentative permit's requirements for ammonia/nutrient and pathogen removal and bolster the scientific support for the requirements, including toxicity, impacts on phytoplankton community composition and Delta food web impacts, nuisance impacts, and health risks. The comments also evaluate compliance with antidegradation policy and provide socioeconomic analyses of affordability. The comments request that the final permit set an interim limit that does



not allow any increase in ammonia discharge over current levels.

Staff has been evaluating comments submitted by the Sanitation District and others in preparation for a hearing before the Regional Board. Metropolitan requested and received formal party status for participation in the proceedings and hearing, which is now scheduled for December 8, 9, and 10. However, the Regional Board may not have the necessary quorum of appointed board members to hear the matter on the scheduled dates, in which case the matter will be put off until such time as new appointments are made that establish a quorum. (See General Counsel's August 2010 Activity Report)

Petition to List the Sacramento Splittail Under the Federal Endangered Species Act

The United States Fish and Wildlife Service (USFWS) published its determination that "listing the Sacramento splittail is **not** warranted at this time" in the October 7, 2010 Federal Register. This process began 18 years ago when the initial petition to list the splittail was submitted (1992) resulting in USFWS' decision to list the fish in

1999. However, a year later a federal court ruled that the listing was in error and returned the matter to USFWS for further review. After that review, USFWS determined in 2003 that the splittail did not qualify for listing and deleted it from the endangered species list. Subsequently, the Center for Biological Diversity sued USFWS challenging the removal of the splittail from the endangered list and USFWS settled that case by agreeing to reconsider whether the splittail should be listed and issue its determination by September 30, 2010.

This most recent review found no recent decline in the overall abundance of splittail. Instead, USFWS found that splittail followed natural hydrological conditions: in wet years it can be one of the more abundant fish in the Delta, with low population numbers in dry years. USFWS also determined that "Research has shown no evidence that south Delta water export operations have had a significant effect on splittail abundance." As a result of these and other findings, USFWS issued its October 7 decision that listing of the splittail was not warranted.

Items of Interest

Finances

Metropolitan's Water Revenue Refunding Bonds (Index Mode), 2009 Series A-2, were successfully remarketed on October 8, 2010. These bonds bear interest at a rate that is reset at least annually through remarketing of the bonds. Legal Department staff worked with Finance staff and outside bond counsel to review the legal requirements for each remarketing, provide notices, certifications and opinions and prepare a remarketing statement (similar to the Official Statement for a new bond issue).

On October 13, 2010, Metropolitan issued \$39,485,000 Waterworks General Obligation Refunding Bonds, 2010 Series A, to refund outstanding general obligation bonds and produce debt service savings. Legal Department staff worked with Finance staff and outside bond counsel to prepare the Official Statement and other disclosure documents and provide the notices, certifications and opinions necessary for closing.