



## Metropolitan Cases

**Delta Smelt and Salmon Biological Opinions Litigation (*Metropolitan v. United States Fish and Wildlife Service; United States Bureau of Reclamation and California Department of Water Resources real parties in interest; 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. and State Water Contractors v. Locke, et al; Kern County Water Agency, et al. v. Gary Locke, et al.*) (U.S. District Courts, Eastern District of California)**

### Delta Smelt BiOp Litigation

On September 16, 2011, Judge Wanger held a hearing on the Federal Defendants' and Environmental Intervenors' motion for a stay of the Fall X2 injunction pending their appeal of that injunction to the U.S. Court of Appeals for the Ninth Circuit. The judge denied the motion for a stay but modified his injunction to provide that it would become effective only after October 15, 2011. This change in the commencement date of the injunction was made because Department of Water Resources (DWR) and Bureau of Reclamation engineers testified that the Fall X2 requirement in the Biological Opinion (BiOp) would not have any adverse water supply impact until after October 15, 2011 based on the latest hydrologic information. Judge Wanger also spent more than an hour at the hearing explaining how he found the sworn testimony of two federal biologists about the scientific issues in dispute in the Fall X2 proceeding to be contradictory, inconsistent, unreliable, and, in places, untruthful. The judge stated that he had never seen such testimony from federal officials before, that he was saddened to see such conduct, and that he was entering a formal finding of bad faith by the Federal Government based on the misleading and incredible testimony of these biologists.

### Salmon BiOp Litigation

On September 20, 2011, Judge Wanger issued his 279-page decision on the cross-motions for summary judgment in the salmon BiOp case. The judge found that the BiOp and its Reasonable and Prudent Alternative (RPA) were arbitrary and

capricious, and must be remanded to the National Marine Fisheries Service (NMFS) to be redone. The judge's decision was "mixed" in that he ruled for the water contractors on some issues and against them on others. However, there were enough major deficiencies in the BiOp and the RPA to require a remand to the NMFS to prepare a new BiOp. It is unknown whether the Federal Defendants and Environmental Intervenors will appeal. The schedule for completing a new salmon BiOp also has not yet been set. There may be further proceedings on interim remedies in the salmon BiOp case over how the projects should be operated while a new salmon BiOp is being prepared. (See General Counsel's June and July 2011 Activity Reports.)

### ***San Diego County Water Authority v. Metropolitan Water District of Southern California* (San Francisco Superior Court)**

On September 22, 2011, Judge Richard Kramer denied Metropolitan's motion to dismiss the Imperial Irrigation District (IID) and the Utility Consumers' Action Network (UCAN) from this case. IID and UCAN had filed answers to the San Diego County Water Authority's (SDCWA) complaint, *supporting* SDCWA's challenge to Metropolitan's rates and charges. Metropolitan's motion to dismiss IID and UCAN was based on our belief that neither party has a direct interest in Metropolitan's rates sufficient to support their standing to be in the case.

In addition, SDCWA officially filed a motion to amend its complaint (originally filed in June 2011) on September 23, 2011. Metropolitan opposes the amended complaint and a hearing on SDCWA's motion has been scheduled for October 27, 2011. The proposed amendment revises the original "reverse validation" complaint challenging Metropolitan's rates, but also attempts to add claims asserting additional bases for its claim that Metropolitan's rates are illegal, including Proposition 13; a claim for breach of the Metropolitan-SDCWA Exchange Agreement; breach of the covenant of good faith and fair dealing; breach of fiduciary duty; a challenge to Metropolitan's "rate structure integrity" provision in its incentive agreements; and the alleged improper



calculation of SDCWA's preferential rights. (See General Counsel's June and August 2011 Activity Reports.)

***Jena Minor v. Metropolitan (Los Angeles County Superior Court)***

On July 12, 2011, the court entered judgment in Metropolitan's favor, based on its earlier summary judgment ruling. On August 19, the court entered an award of litigation costs to Metropolitan in the amount of \$29,401.17. On September 12, plaintiff filed a notice of appeal to the California Court of Appeal of the entry of judgment.

As previously reported, on March 26, 2010, plaintiff, a Metropolitan employee, filed a complaint in Los Angeles County Superior Court against

Metropolitan. Plaintiff alleged retaliation in violation of the Fair Employment and Housing Act for having engaged in the protected activity of complaining about gender and race discrimination and sexual harassment, and for having complained about retaliation. On June 14, 2011, the court granted Metropolitan's motion for summary judgment, ruling that there was no issue of material fact for the jury to determine and that judgment is to be entered in Metropolitan's favor.

Metropolitan's Legal Department provided legal representation for Metropolitan through November 2010, when the law firm of Meserve, Mumper and Hughes LLP associated in as counsel. (See General Counsel's May and June 2011 Activity Reports.)

## Matters Involving Metropolitan

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

These three lawsuits brought by environmental organizations, two Delta water agencies, and two Kern County water storage districts challenge the Monterey Amendment to the State Water Project contracts. The cases include CEQA challenges to DWR's May 2010 completion of a new Environmental Impact Report (EIR) for the project, as well as reverse validation challenges to the underlying contracts.

To date, activity in these cases has been focused on pre-trial motions and preparation of the administrative records. In August, the court heard argument on two motions to dismiss the cases; one brought by Metropolitan and other contractors on "indispensable party" grounds and another by the Kern Water Bank Authority members on "res judicata" grounds. The indispensable party motion argues that because Metropolitan and other State Water Contractors are necessary and indispensable parties that were not originally named in the "Rosedale" case and cannot now be added since the CEQA statute of limitations period has run, the case must be dismissed. In September the court issued its decision overruling this motion. The res judicata motion argues that a court has

already deemed that the EIR complies with CEQA when DWR filed the new EIR with the original trial court and that court then dismissed the original *Monterey I* case. The court has yet to issue a ruling on this motion. (See General Counsel's January and June 2011 Activity Reports.)

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

The parties, including Metropolitan staff, participated in four additional mediation sessions in this case. In addition, Metropolitan and its fellow intervenors, the DWR and plaintiffs each met separately with Sacramento Superior Court Presiding Judge Robert Hight to review the status of the mediation. Plaintiffs are north of Delta state water contractors who allege that since they are located in the watershed of origin of State Water Project water, they should not be subject to the shortage provisions of their state water contracts. Metropolitan has coordinated a group of 14 south of Delta contractors who intervened in support of DWR. (See General Counsel's June and August 2011 Activity Reports.)

***Sacramento Regional County Sanitation District NPDES Permit***

Last December, the Central Valley Regional Water Quality Control Board (Regional Board) ordered a new discharge permit for the Sacramento Regional County Sanitation District's (SRCSD) 181-million-gallon-per-day (mgd) wastewater treatment plant.



The new discharge permit will require nitrification/denitrification and filtration upgrades. In January of this year, SRCSD appealed the Regional Board's order to the State Water Resources Control Board (SWRCB), seeking to overturn the new stringent permit limits. California Sportfishing Protection Alliance (CSPA) also appealed. Metropolitan and certain other state and federal water contractors are formal parties to the proceedings and filed detailed technical and legal responses to the appeal petitions in May.

SWRCB regulations generally require final disposition on appeal petitions within 270 days of the date a petition is deemed complete, which in this case would be by December 23, 2011. If SWRCB has not made a formal disposition within this time frame, the regulations deem the appeal

petition denied. However, these timeframes are not applicable if SWRCB reviews a petition "on its own motion." On September 19, SWRCB held a hearing on its proposal to review the appeal petitions on its own motion. On October 4, the adopted an order providing for "on own motion" review. The order calls for circulation of a draft decision on the merits of the appeal petitions by May 2012.

Also in September, Metropolitan and the other water contractor parties filed several pleadings in response to various objections SRCSD raised on our May filings. This should close the briefing before SWRCB. (See General Counsel's December 2010 and January 2011 Activity Reports.)

## Items of Interest

### Finances

Metropolitan issued its \$157,100,000 Water Revenue Refunding Bonds, 2011 Series C on September 27, 2011 to refund outstanding fixed rate bonds for debt service savings, and on September 28 posted the remarketing statement for \$104,185,000 Water Revenue Refunding Bonds, 2009 Series A-1 (Index Mode). Legal Department staff attorneys worked with finance and resources staff to prepare Appendix A for the Official Statement describing the 2011 Series C bonds, which is also incorporated by reference in the remarketing statement for the 2009 Series A-1 bonds, and worked with bond counsel to prepare bond documents.